APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 314—September Term, 1980

(Argued: October 17, 1980 Decided: January 9, 1981)

Docket No. 80-7418

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Plaintiffs-Appellees,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,

Circuit Judges.

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order of the District Court for the Southern District of New York, entered by Judge Charles H. Tenney denying defendant's motion to dismiss plaintiffs' claims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, on the ground that the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan exempts defendant from any legal challenge to its practice of filling its executive-level positions with Japanese nationals.

Affirmed and remanded.

J. PORTIS HICKS, Esq., New York, NY (Wender, Murase & White, New York, NY, of counsel), *for Appellant.*

LEWIS M. STEEL, Esq., New York NY (Eisner Levy Steel & Bellman, P.C., New York, NY, of counsel), *for Appellees.*

MARCIA B. RUSKIN, Attorney, Equal Employment Opportunity Commission, Washington, DC (Leroy D. Clark, General Counsel, Joseph T. Eedins, Associate General Counsel, Lutz Alexander Prager, Attorney, Equal Employment Opportunity Commission, Washington, DC, of counsel), *for Amicus Curiae Equal Employment Opportunity Commission.*

MANSFIELD, *Circuit Judge*:

Sumitomo Shoji America, Inc. ("Sumitomo"), a New York-incorporated, wholly-owned subsidiary of a Japanese commercial firm, appeals pursuant to 28 U.S.C. § 1292(b) from an

order of the District Court for the Southern District of New York entered by Judge Charles H. Tenney, denying its motion to dismiss this class action against it by female secretarial employees claiming that its practice of hiring only male Japanese nationals for management-level positions discriminates against them on the basis of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), the Civil Rights Act of 1966, 42 U.S.C. § 1981, and the Thirteenth Amendment. Dismissal was sought by Sumitomo pursuant to F.R.Civ.P. 12(b)(6) on the ground that the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (the "Treaty" or "Japanese Treaty"), exempts Japanese trading companies and their wholly-owned subsidiaries incorporated in the United States from the application of Title VII. Judge Tenney denied Sumitomo's motion insofar as it sought dismissal of plaintiffs' Title VII claims,[1] on the ground that the Treaty was not meant to protect the employment practices of Japanese subsidiaries incorporated in the United States. 473 F. Supp. 506. Sumitomo sought an immediate appeal of this question under 28 U.S.C. § 1292(b), and that request was granted.[2]

---

1 The district court did, however, dismiss plaintiffs' § 1981 claim on other grounds, and also found that plaintiffs' Thirteenth Amendment claim had been abandoned.

2 *Avigliano, et al. v. Sumitomo Shoji America, Inc.*, No. 77 Civ. 5641 (CHT) (August 9, 1979) (unreported). Judge Tenney refused to certify two questions of law which plaintiffs had sought to appeal: whether an allegation of sex and nationality discrimination makes out a valid cause of action under § 1981, and whether defendant's counterclaims sounding in common law tort should have been dismissed. Neither issue is before us this time

Before the appeal could be heard counsel for Sumitomo sought reconsideration of Judge Teeney's refusal to dismiss, based on the U.S. Department of State's recent release of a number of documents which apparently were relevant to a proper interpretation of the Japanese Treaty. Judge Tenney granted Sumitomo's request for reconsideration, and this Court in effect remanded to Judge Tenney by denying Sumitomo's permission to appeal, but without prejudice to a later renewal of that request. After reconsideration based on the State

We affirm, but on grounds other than that relied on by the district court. We hold that Sumitomo was entitled to invoke the employment provisions of the Treaty, but that the Treaty does not exempt Japanese companies operating in the United States, whether or not they are incorporated in the United States, from American laws prohibiting discrimination in employment.

The Japanese Treaty is a commercial agreement designed to encourage trade and investment between the United States and Japan. It is one of several dozen similar treaties entered into by the United States in the post-World War II period, and carries on a tradition antedating the Constitution. See generally, Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230-31 (1956) (hereinafter cited as *Treaties*). The general aim of these treaties is to

> "establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country." *Id.* at 230.

In the Japanese Treaty, as in almost all other Friendship, Commerce and Navigation ("FCN") agreements, the goal of equal protection of the laws is put into effect by means of specific provisions "based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded." 4 U.S.T. at 2066.

The heart of the Japanese Treaty is Article VII, which the State Department has called "the basic 'establishment' provi-

---

Department documents, Judge Tenney once again denied Sumitomo's motion to dismiss, this time on the ground that, while Japanese subsidiaries incorporated in the United States are given some rights by the Treaty, the specific provision of the Treaty on which Sumitomo was relying was not intended to apply to subsidiaries. *Avigliano, et al. v. Sumitomo Shoji America, Inc.*, No. 77 Civ. 5641 (CHT) (November 29, 1979) (unreported).

sion." Outgoing Airgram No. A-453, Department of State to USPOLAD, Tokyo, dated January 7, 1952. Article VII provides in relevant part that:

> "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, *whether directly or by agents or through the medium of any form of lawful juridical entity.* Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) *to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party;* and (c) *to control and manage enterprises which they have established or acquired.* Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party." 4 U.S.T. at 2069. (Emphasis supplied.)

In order to facilitate the staffing of overseas operations, the Treaty provides in Article I that:

> "Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein:
>
> (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities. . . ." *Id.* at 2066,

and in Article VIII that

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive person-

> nel, attorneys, agents and other specialists *of their choice." Id.* at 2070. (Emphasis supplied).

Implementing these provisions, the State Department has issued regulations applicable to the FCN treaties which greatly facilitate the entry into the United States of Japanese nationals who will work as "treaty traders" for Japanese trading units set up pursuant to Article VII of the Treaty. 22 C.F.R. § 41.40.

In addressing defendant's motion to dismiss based on the Treaty, the district court did not rule on whether the freedom-of-choice language of Article VII ("companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . of their choice") was sufficiently broad to exempt Japanese subsidiaries operating in the United States from the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. 473 F. Supp. at 509-13. Its ruling was instead limited to the question of Sumitomo's standing. In its first opinion, the court held that a U.S.-incorporated subsidiary such as Sumitomo could not "invoke the aegis of the Treaty as sanction for its employment practices," 473 F. Supp. at 509, because the definitional section of the Treaty, Article XXII(3), provides that:

> "Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." Article XXII(3), 4 U.S.T. at 2080; *quoted at* 473 F. Supp. at 509. (Emphasis supplied).

In the court's opinion, the emphasized language of Article XXII(3) had the effect of classifying Sumitomo as an American, not a Japanese corporation, and thus barred it from invoking Article VIII. In its second opinion (dated November 29, 1979) the court conceded that

> "Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty."

Nevertheless, despite its finding that Article XXII(3) did no more than determine "an entity's status" and was not meant to limit or define the substantive rights which an entity was to enjoy under the Treaty, the district court refused to alter its original view that Sumitomo lacked standing to invoke Article VIII:

> "Articles VI(4) and VII(1) & (4), by their terms, give 'enterprises in which nationals and companies . . . have a substantial interest' and enterprises controlled by nationals and companies, respectively, substantive rights. The drafters knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to 'nationals and companies of either Party . . . within the territories of the other Party.' Because the provision does not by its own terms extend to locally incorporated subsidiaries, the Court must look to Article XXII(3) to determine whether 'nationals and companies' can be read to include subsidiaries. That Article provides that '[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof.' By this language Sumitomo is a United States company. It is not a Japanese company and is thereby ineligible for freedom-of-choice protection within the territories of the United States."

DISCUSSION

Sumitomo's Standing

We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form, something which we have

previously rejected in treaty construction. *Reed v. Wiser*, 555 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Moreover, such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally. See generally, *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *affd.*, 373 U.S. 49 (1963). In addition, if the district court's reading were adopted, a Japanese enterprise could easily circumvent such a construction by simply transforming its wholly-owned U.S. subsidiaries into branches. To adopt such a reading would also in our opinion do violence to the admittedly unitary structure of Articles VII and VIII, see, e.g., Foreign Service Despatch No. 2529, from High Commissioner for Germany to the Department of State, dated March 18, 1954, p. 1. It is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains.

Finally, if we were to accept the view that the three provisions in the Treaty which explicitly grant rights to subsidiaries (Article VI(4), Article VII(1) and Article VII(4) exhaust the rights to be accorded to them, a crazy-quilt pattern would emerge. Under such a reading *Japanese branches* in the United States would be guaranteed "access to the courts of justice" (Article IV(1)), protected against "unlawful entry or molestation" (Article VI(2)), given the right to dispose of "property of all kinds" (Article IX(4)), allowed to obtain and maintain "patents of invention" (Article X), permitted to make "payments, remittances and transfers of funds or financial instruments" (Article XII(1)), and allowed to engage in "importation and exportation" (Article XIV(5)). *Japanese subsidiaries*, on the other hand, would not be guaranteed any of the rights conferred on Japanese branches operating in the United States, but would instead have to be content with national treatment in such areas as "the taking of privately owned enterprises into

public ownership and . . . the placing of such enterprises under public control" (Article VI(4)). It is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation or to act in such a haphazard way.

In our view the three provisions in the Treaty which specifically mention subsidiaries were not intended to define the outer limits of the rights to be accorded to them, but were instead designed to add to the rights which parties were to enjoy in their capacity as "companies of either Party." This construction furthers the Treaty's purpose, which is to support foreign investment generally, regardless of the specific corporate vehicle employed. Given the complete absence of any evidence in the Treaty's legislative history suggesting that only Japanese branches were to be given the various specific guarantees listed above but that Japanese subsidiaries were not, we are persuaded that the form of business operation was not considered relevant to the question of which entities could invoke the substantive provisions of the Treaty, except in three instances where *extra* protection was to be accorded to subsidiaries.

This interpretation also finds support in negotiations preceding the ratification of another FCN treaty, that between the United States and the Netherlands. There, Dutch negotiators expressed concern that the proposed treaty language (which was identical in all relevant respects to the language contained in the Japanese Treaty) might be read as not conferring equal benefits on branches and subsidiaries (or "controlled companies," in the usage of the negotiators). The Dutch were particularly concerned that the provision in Article XXIII(3) of the Dutch treaty (which tracked the language of Article XXII(3) of the Japanese Treaty) would exclude locally-incorporated subsidiaries from all substantive benefits accorded to "companies of either Party." State Department negotiators made it clear that this was not the case, and were even prepared to insert a clarifying phrase in Article XXIII(3), if necessary:

> "[D]espite a superficial appearance to the contrary, the legal adviser's formulation of the proviso to be inserted in

> Article XXIII paragraph 3 was *not* calculated to detract in any way from the rights and privileges a 'controlled company' would otherwise enjoy. . . . [T]he treaty is always a floor and not a ceiling. The effect of the legal advisor's formulation was to assure that the 'controlled company' will always, as a minimum, get everything that the parent company gets as a matter of treaty *right*—but was not calculated to detract from any additional privileges that the 'controlled company' may actually have. . . . The Department has the same interests as [the Dutch negotiators] in avoiding damage to the position of 'controlled companies', because Americans have 'controlled companies' abroad just as the Dutch have them in the U.S." Official-Informal Letter from Herman Walker, Jr.,[3] Trade Agreements and Treaty Division, Department of State, to Counselor for Economic Affairs, American Embassy, the Hague, Netherlands, dated October 28, 1955. (Emphasis in original).

After extensive discussions on the issue, the Dutch negotiators concluded that there was in fact no need to include in the Treaty a provision explicitly conferring parent company rights on subsidiaries:

> "[N]obody would deny to a company controlled by nationals or companies of one of the contracting Parties the treatment, which is accorded to the parent company, except perhaps in a very special case e.g. taxation. . . . As the principle is generally accepted I think it would be superfluous to spell it out." Letter from Netherlands Negotiator to Economic Counselor, U.S. Embassy, The Hague, Netherlands, dated November 8, 1955.

This incident corroborates our view, based on the language and purpose of the Japanese Treaty, that those provisions

---

3 The author's identity, while not appearing on the letter itself, can be determined by noting the addressee of the letter written in reply, Official-Informal Letter from Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated November 4, 1955.

which specifically grant rights to subsidiaries were not intended to bar subsidiaries from enjoying the additional rights granted to branches.

In short, as the district court recognized (but did not apply), Article XXII(3) defines a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty. This view of Article XXII(3) has been adopted consistently throughout the life of the Treaty, see, e.g., Department of State Despatch No. 13 from Office of the United States Political Adviser for Japan, dated April 8, 1952; Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 383 (1956); Department of State Airgram No. A-105, to American Embassy, Tokyo, dated January 9, 1976, and in our opinion is supportive of the general policies underlying the Treaty. The district court's acceptance of this general proposition is inconsistent with its eventual conclusion that Article XXII(3) bars Sumitomo from invoking Article VIII.[4] Since Sumitomo is a wholly-owned

---

4 Article XXII(3) leaves open the determination of whether a subsidiary incorporated in the United States is sufficiently "Japanese" to invoke the Treaty's various substantive provisions. Resolution of this issue would depend on a case-by-case analysis of the relevant facts. In resolving the issue the regulations adopted by the Department of State in connection with admission of treaty traders are relevant. For a treaty trader to be admitted,

> "The employment must be . . . by an organization which is principally owned by a person or persons having the nationality of the treaty country." 22 C.F.R. § 41.40(a).

The State Department has supplemented this basic regulation with visa rules further prescribing the standards to be met by treaty traders entering the United States. These rules define the nationality of a corporation eligible to employ treaty traders as follows:

> "The nationality of a firm is determined for the purpose of section 101(a)(15)(E)[8 U.S.C. § 1101(a) of the Immigration and Nationality Act of 1952] by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation, regardless of the place of incorporation." 9 *Foreign Affairs Manual*, Part II, § 41.40, Note 8. See generally, *Matter of N.S.*, VII I. & N. Decs. 426, 428 (1957).

subsidiary of a Japanese corporation, it is properly classified as a Japanese company for the purpose of invoking the substantive provisions of the Treaty, including Article VIII.[5]

---

5 We are aware that the State Department has recently reached a conclusion on this issue which is at variance with ours. See Letter from James R. Atwood, Deputy Legal Adviser, U.S. Department of State to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission, dated September 11, 1979, *reprinted in* 74 Am. J. Int'l L. at 158-59 (1980) ("it was not the intent of the negotiators to cover locally-incorporated subsidiaries").

Even after giving weight to the State Department's views, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), we do not find its position persuasive. The September 11, 1979, letter announcing the Department's position directly contradicted a similar letter written on behalf of the Department less than a year earlier. Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *reprinted in* 73 Am. J. Int'l L. at 281-84 (1979) ("In determining the scope of Article VIII [of the Japanese Treaty], we see no grounds for distinguishing between subsidiaries incorporated in the United States . . . and those operating as unincorporated branches"). Moreover, both letters were conclusory in tone, providing little guidance as to how the author reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 letter explain how the 1978 letter writer had fallen into error.

On September 26, 1980, long after this appeal had been taken, counsel for the Equal Employment Opportunity Commission ("EEOC"), which is participating in this case as *amicus curiae*, sent us a copy of a State Department document purporting to be a letter dated September 9, 1980, from the Department of State to the Government of Denmark to the effect that it was not the intent of negotiators of such a FCN treaty to permit locally-incorporated subsidiaries to invoke its provisions. However, the letter bears evidence that the EEOC, several months prior to the transmittal of the State Department's letter, had participated in its preparation (it bears the notations "Clearances: EEOC/GC L. Prager," who is counsel for the EEOC as amicus on this appeal), from which it might be inferred that the letter was designed to support the EEOC's position here.

Under the circumstances it was improper for the EEOC to have submitted the September 9th letter to us. However, since we give it no weight whatsoever we deny Sumitomo's motion for permission to investigate its provenance.

Relationship Between Article VIII of the Treaty and Title VII of the Civil Rights Act of 1964

Turning to the question of whether the freedom-of-choice language of Article VIII of the Treaty exempts Sumitomo from Title VII of the Civil Rights Act of 1964 as far as its executive personnel are concerned,[6] we hold that the Treaty does not have such effect. The right of Japanese firms operating in the United States under the Treaty to hire executives "of their choice" does not give them license to violate American laws prohibiting discrimination in employment.

The background of the Treaty does not support the expansive interpretation of the words "of their choice" urged by Sumitomo. At the time when the Treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries. Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 952-53 & n.28 (1979); S. Metzger, *International Law, Trade and Finance: Reality and Prospects* 151 (1962). The provision in Article VIII of the Treaty allowing companies of either party to engage executive personnel "of their choice" when operating in the other party's territory was a reaction to those restrictions. It was primarily intended to exempt companies operating abroad from local legislation restricting the

---

6 Although Judge Tenney limited the question being certified to the narrow issue of Sumitomo's standing to invoke Article VIII of the Treaty and made it quite clear that he had not reached any opinion as to the degree of protection which Article VIII might provide from charges of discrimination under Title VII, it would be a waste of judicial resources to remand without reaching the substantive question which Sumitomo's motion to dismiss inevitably poses. The issue has been fully briefed and argued by the parties before us. Evidence concerning Sumitomo's hiring practices would not help us resolve the question. Failure to resolve the question would only open the door to a wasteful second appeal after trial below. Under these circumstances we are not limited to deciding the question formulated by the district court, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1975).

employment of noncitizens. Walker, *Treaties, supra,* at 234 ("management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions and the like"). See generally, Foreign Service Despatch No. 2529 from HICOG Bonn to Department of State, dated March 18, 1954 (German FCN treaty); H. Steiner & D. Vagts, *Transnational Legal Problems* 37-38 (1968).

Although the clause "of their choice" was also intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country, no evidence supports Sumitomo's broad interpretation which, carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212, laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-97, and the like.

Subjecting a Japanese company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), expressly provides that

> "it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . national origin in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

Although the "bona fide occupational qualification" ("bfoq") exception of Title VII is to be construed narrowly in the normal context, *Dothard v. Rawlinson,* 433 U.S. 321, 334 (1977), we believe that as applied to a Japanese company enjoying rights under Article VIII of the Treaty it must be

construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business. To require the Japanese company to go forward with some evidence of bfoq status does not in our view impose undue burdens on foreign employers. In the absence of an evidentiary record on these matters, however, we cannot determine now whether all or some portion of the executive positions at Sumitomo qualify for bfoq status.

Accordingly the case is remanded to the district court for further proceedings consistent with the foregoing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-7418

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and eighty-one.

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. THOMAS J. MESKILL

Circuit Judges,

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Plaintiffs-Appellees,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed and remanded in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

by /s/ ARTHUR HELLER
Arthur Heller,
Deputy Clerk

Judgment Entered 2/10/81
Second Circuit
Raymond J. Burghardt, Clerk

Filed U.S. District Court, S.D. of N.Y.
February 10, 1981

Filed United States Court of Appeals
Second Circuit, January 9, 1981, A. Daniel
Fusaro, Clerk

APPENDIX C

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

June 5, 1979
77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

APPEARANCES

For Plaintiffs:
EISNER, LEVY, STEEL & BELLMAN, P.C.,
351 Broadway
New York, New York, 10013

Of Counsel:
LEWIS M. STEEL, ESQ.

For Defendant:
WENDER, MURASE & WHITE
400 Park Avenue
New York, New York, 10022

Of counsel:
JIRO MURASE, ESQ.,
J. PORTIS HICKS, ESQ.,
EDWARD H. MARTIN, ESQ.,
LANCE GOTTHOFFER, ESQ.,

Amicus Curiae:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C., 20506

Of counsel:
ABNER W. SIBAL,
General Counsel
JOSEPH T. EDDINS,
Associate General Counsel
LUTZ ALEXANDER PRAGER, Esq.,
JOHN D. SCHMELZER, Esq.,

Local Counsel (E.E.O.C.):
RONALD COPELAND, ESQ.,
Regional Counsel
26 Federal Plaza
New York, New York, 10007

TENNEY, *J.*

In this civil rights case, plaintiffs charge discrimination on the bases of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1974), and of 42 U.S.C. § 1981 (1970).[1] They seek class action status. Plaintiffs are past and present female secretarial employees of defendant Sumitomo Shoji America, Inc.[2] ("Sumitomo"). Sumitomo is an "integrated trading company"[3]

1 The complaint also includes a claim under the thirteenth amendment to the United States Constitution. As this claim apparently has been dropped, the Court sees no need to consider its merits.

2 The plaintiffs are eleven women, all of whom claim to be citizens of the United States except for one who claims to be a citizen of Japan. The complaint offers no other details of plaintiffs' claims.

3 "Integrated trading companies" engage primarily in the purchase and resale of goods, mainly in import and export markets. According to the Affidavit of J. Portis Hicks, sworn to May 18, 1978, there are fewer than a dozen integrated trading companies and these account for more than 50% of Japan's imports and exports.

incorporated in New York as a wholly owned subsidiary of a Japanese corporation. The parent corporation is not a party to this action. Plaintiffs, seeking injunctive and compensatory relief, claim that they have been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positions for which Sumitomo favors male citizens of Japan. Jurisdiction is based upon 28 U.S.C. § 1331 and § 1343.[4]

Sumitomo denies that the company discriminates and now moves pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted under Title VII and section 1981. Sumitomo claims that the provisions of Title VII and of section 1981 must yield to the right of freedom of choice in employment assured by the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. 2863 (entered into force Oct. 30, 1953) ("the Treaty"). In addition to positing that Sumitomo is insulated from federal review of its employment practices by the Treaty, Sumitomo claims that plaintiffs' allegations of discrimination based on sex and national origin fail to state a claim under 42 U.S.C. § 1981.

Sumitomo also interposes four counterclaims, invoking this Court's ancillary jurisdiction essentially to seek redress for plaintiffs' alleged abuse of legal process and tortious interference with Sumitomo's business activities. Plaintiffs cross-move for dismissal of the counterclaims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that none states a claim upon which relief can be granted and that the

---

4 Reference in the jurisdictional statement to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act) remains a mystery to the Court, which can discern no basis for this relief. Plaintiffs seek judgment (1) enjoining the defendant from engaging in the alleged unlawful employment practices, both current and future; (2) directing the defendant to promote plaintiffs to executive and other managerial and sales positions and to institute a training program to upgrade plaintiffs and to take affirmative action to remedy the effects of past discriminatory practices; (3) for compensatory and punitive damages; and (4) for the cost of the action with reasonable attorney's fees. Unless plaintiffs wish to enlighten the Court, the demand for declaratory relief will be stricken.

Court lacks subject matter jurisdiction. For the reasons discussed below, the motions to dismiss plaintiffs' section 1981 claim and Sumitomo's first counterclaim are granted, and the motions to dismiss the Title VII claim and the remaining counterclaims are denied.

The Treaty

On April 2, 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The purpose of the Treaty is

> [to strengthen] the bonds of peace and friendship traditionally existing between them and [to encourage] closer economic and cultural relations between their peoples . . . by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges . . . based in general upon the principles of national and most-favored-nation treatment unconditionally accorded . . . .[5]

4 U.S.T. at 2066. The effect of the Treaty is to assure that nationals of one party are not discriminated against within the territory of the other party.[6]

Article VIII(1) of the Treaty provides, in pertinent part, that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 2070. Sumitomo, in moving to dismiss the discrimination claims against it, frames the issue before this Court as whether Title VII and section 1981 of the Civil Rights Act of 1964 must yield

---

5 Preface, Treaty of Friendship, Commerce and Navigation Between The United States of America and Japan (April 2, 1953).

6 *See United States v. R.P. Oldham Company,* 152 F. Supp. 818 (N.D. Cal. 1957).

to the right of freedom of choice in executive and other specialist personnel granted by Article VIII(1) of the Treaty. However, the Court finds that the issue before it is even more fundamental; that is, whether Sumitomo can invoke the aegis of the Treaty as sanction for its employment practices. The initial inquiry concerns the nationality of Sumitomo.

Article VIII(1) of the Treaty provides that Japanese and American corporations may engage within the territory of the other certain personnel of their choice. Article XXII, the definitional section of the Treaty, states in paragraph 3 that:

> [a]s used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other party.

Id. at 2079-80.[7] This is entirely consistent with traditional rules of corporate law which, for most purposes, treat a corporation as an entity distinct from its shareholders and accord to the corporation the citizenship of its place of incorporation:

> The theory of "corporate personality" permits a corporation to be regarded as a "person" with an existence—in the state of incorporation—separate from the natural persons who own it. . . . [F]or purposes of federal court jurisdiction . . . a corporation is "deemed" to be a citizen of the state by which it was created.

Hornstein, *Corporate Law and Practice* § 281 (1959) (*citing Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43

---

7 This provision has been paraphrased by the court in *United States v. R.P. Oldham Company, supra,* 152 F. Supp. at 823:

> [B]y the terms of the Treaty itself as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.

U.S. (2 How.) 497, 555, 11 L. Ed. 353 (1844)). Sumitomo is incorporated under the laws of New York. Therefore, according to the very terms of the Treaty, Sumitomo is a company of the United States, not of Japan, and as such has no standing to invoke the freedom-of-choice provision granted by Article VIII(1) to companies of Japan within the territory of the United States.

This conclusion is supported by two district court decisions in which the 1953 Japanese-American Treaty was raised by way of defense. In *United States v. R. P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957), a wholly owned American subsidiary of a Japanese corporation was one of five corporations indicted for conspiracy in restraint of commerce in Japanese wire nails. The defendant argued that Article XVIII of the Treaty, which dealt with antitrust violations, denied the federal court jurisdiction by providing the exclusive remedy. Not only did the district court hold that Article XVIII provided a supplemental rather than exclusive remedy, but it also found that, even were Article XVIII an exclusive remedy, the California-incorporated subsidiary lacked standing to invoke this provision. The nationality of the defendant was determined by the terms of Article XXII and the traditional principles of corporate law. Moreover, the *Oldham* court found this conclusion not inconsistent with the policies underlying the Treaty:

> If [the defendant] had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

United States v. R. P. Oldham Co., *supra*, 152 F. Supp. at 823.

In *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979), Judge Bue of the Southern District of Texas recently held that the 1953 Treaty did not provide the New York-incorporated subsidiary of a Japanese corporation with immunity from Title VII and section 1981. The motion before Judge Bue was essentially identical to that before this Court.

Non-Japanese employees of a wholly owned domestic subsidiary of a Japanese corporation filed suit against their employer alleging racially discriminatory employment practices. The defendant C. Itoh & Co. (America), Inc. ("Itoh-America") moved to dismiss, arguing that under the Treaty it has an absolute right to hire personnel of its choice. In a well reasoned opinion, Judge Bue held:

> Given the Treaty's own definitional terms, Itoh-America is a company of the United States for purposes of the interpretation of Article VIII(1), . . . which applies only to companies of one party within the territories of the other party. . . . Itoh-America is a United States company for purposes of Title VIII and, like other United States companies, is subject to suit on the grounds that its employment practices are racially discriminatory.

Id. at 9.[8]

---

8 Itoh-America contended, as does Sumitomo, that subsequent developments and expansion of the concept of standing renders obsolete the *Oldham* analysis of the standing of corporate subsidiaries. *Citing Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), both Itoh-America and Sumitomo argue that the *Oldham* test has been implicitly overruled by a liberalized standard. In *Calnetics*, a private antitrust action was commenced against a United States-incorporated subsidiary of a West German corporation and its wholly owned American-incorporated air conditioning subsidiary. The district court found that the defendants had violated the antitrust laws and ordered, *inter alia*, a seven-year import ban in the United States of Volkswagens with factory-installed air conditioning.

The Ninth Circuit reversed the finding of antitrust violations and questioned the remedy imposed because the effect might be to discriminate against West German products in contravention of the German-American Treaty of 1954. Judge Bue has distinguished *Calnetics*, and this Court concurs in his analysis:

> Read in a light most favorable to Itoh-America, *Calnetics* stands for the proposition that a United States incorporated subsidiary of a foreign corporation has standing to raise the claim that the Treaty rights of its parent may be affected by court ordered relief. . . . In *Calnetics* the Court of Appeals determined that the import ban ordered by the trial court might discriminate against the products of VW-Germany in contravention of that company's Treaty rights. By contrast . . . Itoh-Japan [the parent company of Itoh-America] has

To avoid the conclusion that it has no standing to invoke the Treaty, Sumitomo relies upon a four-page letter submitted on November 17, 1978 by the United States Department of State to the Equal Employment Opportunity Commission ("EEOC"). The EEOC, which has submitted an amicus curiae brief here in opposition to Sumitomo's motion to dismiss,[9] has posed certain questions to the State Department. To one, "[d]oes the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders,"[10] the State Department replied, in pertinent part:

> The phrase "of their choice" should be interpreted to give effect to [the intention that United States companies operating in Japan could hire United States personnel for critical positions, and vice versa], and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. . . .

Letter from Lee R. Marks, Deputy Legal Adviser, Department of State, dated October 17, 1978, to Abner W. Sibal, General Counsel, EEOC.

To another question, "[i]s the situation different if the company doing business in the United States is not incorporated in the United States," the State Department replied, in pertinent part:

> no Article VIII(1) right to staff Itoh-America. Accordingly . . . even if Itoh-America has standing to invoke the Treaty rights of Itoh-Japan, it can claim no shield against application of Title VII to its own employment practices.
>
> *Spiess v. C. Itoh & Co. (America), Inc., supra,* 469 F. Supp. at 9.

9 The EEOC also filed an amicus brief in support of plaintiffs' motion to dismiss the counterclaims. *See* text *infra.*

10 *See* text *infra.*

> [W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

Id.

Sumitomo relies upon these statements to confirm its "preferential right and privilege to hire non-immigrant Japanese nationals" under the Treaty. The Court has carefully considered the State Department letter and is mindful of the Supreme Court's admonition in *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926, 6 L. Ed. 2d 218 (1960), that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *See also Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S. Ct. 191, 78 L. Ed. 315 (1933). However, in the absence of analysis or reasoning offered by the State Department in support of its position,[11] this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1), or to reject established principles of corporate law and the precedents in the Fifth and Ninth Circuits.[12]

---

11 It is disturbing that, in concluding that companies doing business and companies incorporated in the United States are to be treated equally under the Treaty, the State Department quotes only the first portion of the definitional section: "Article XXIII [sic] defines 'companies' as 'corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.' " The State Department neglects to quote the following sentence, which states that companies formed under the applicable laws of one of the parties are deemed companies thereof.

12 Subsequent to the filing of the district court's Memorandum and Opinion in *Spiess v. C. Itoh & Co. (America), Inc., supra*, the opinion letter submitted by the Department of State to the EEOC was brought to the attention of that court, and a motion was filed requesting certification of the March 1, 1979 Order to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Sumitomo also contends that it retains Japanese identity by virtue of United States regulations and guidelines adopted in connection with Article I of the Treaty, which enables nationals of either the United States or Japan to enter the territories of the other and to remain therein for specified purposes. In connection with Article I of the Treaty, section 1101(a)(15) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, provides:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens . . . .
>
> . . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . .

The Department of State has promulgated regulations that an alien must satisfy in order to obtain a treaty trader visa pursuant to section 1101(a)(15)(E)(i). Among these is that if the

---

Reconsidering his decision in light of the State Department letter, Judge Bue reaffirmed his holding that Itoh-America is a company of the United States under the terms of the Treaty and concluded that the opinion letter did not warrant reversal of the court's prior order.

Nevertheless, certification was granted because

> [t]he Court concludes that the March 1 Order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate determination of this litigation.

Spiess v. C. Itoh & Co. (America), Inc., 469 F. Supp. 9 (S.D. Tex. Apr. 10, 1979).

Accordingly, the following question was certified to the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10.

employer is not an individual, it "must be . . . an organization which is principally owned by a person or persons having the nationality of the Treaty country." 22 C.F.R. § 41.40 (1977). The parameters of this regulation are further described in 9 FOREIGN AFFAIRS MANUAL PART II, which states: "the nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation regardless of the place of incorporation."[13]

Sumitomo seizes on the regulatory standard to urge that nationality for purposes of the Treaty should be determined by the State Department guidelines, explaining that it is by interaction with Article I that the Article VIII "freedom of choice" provision is implemented. As Sumitomo is a wholly owned subsidiary of a Japanese company, by this test Sumitomo also would be a Japanese company. The Court agrees with Judge Bue who, when presented with the same argument, found that "resort to the treaty trader guidelines to determine corporate nationality for purposes of interpretation of the Treaty provisions is unwarranted in the face of the clear definitional provisions included in Article XXII(3) of the Treaty itself." *Spiess v. C. Itoh & Co., supra*, 469 F. Supp. at 6.[14] The purpose of the Treaty is to assure that Japanese

---

13 The Manual is distributed to all State Department consular offices and to the offices of District Directors of Immigration.

14 The State Department guidelines are promulgated for the purpose of determining an individual's immigration status; they are not designed for the purpose of defining a corporation's juridical status. Two decisions from this district lend support to this conclusion.

In *Tokyo Sansei v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969), an action for review of the determination of the district director of the Immigration and Naturalization Service ("INS") was brought by individuals who had been denied treaty trader status. Their corporate employer, a wholly owned subsidiary of a Japanese corporation, joined in the action as a plaintiff. The district court upheld the administrative determination denying treaty trader status and noted that

> the question [whether the employer has standing] is substantial. It seems likely that without the individual plaintiffs, the corporation, however great its incidental "interest" as a business matter, could not maintain the suit. And with the individuals in the case, the corporation, strictly speaking, is unnecessary. . . .

Id. at 948 n.4.

(Footnote continued)

companies operating in the United States, and vice versa, will not be discriminated against in favor of domestic corporations. Sumitomo is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty. Accordingly, the motion to dismiss the discrimination claims on the basis of the Treaty is denied.

The Section 1981 Claims

The second issue before the Court is whether the provisions of 42 U.S.C. section 1981[15] apply to claims alleging discrimination based on sex and national origin. The law in this circuit, as in others, is clear that section 1981 does not apply to sex discrimination. *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 377 F. Supp. 481 (S.D.N.Y. 1974), *rev'd on other grounds*, 512 F.2d 856 (2d Cir. 1975); *O'Connell v. Teachers College*, 63 F.R.D. 638 (S.D.N.Y. 1974). *See also Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D.N.M. 1978).

Similarly, in *Nippon Express U.S.A., Inc. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1966), a subsidiary of a Japanese express company sought review of the denial by the INS district director of an application made by the corporate employer on behalf of an alien employee for continuation of her status as a treaty trader. The district court concluded that

> [t]he Immigration and Naturalization Service has the responsibility for deciding [treaty trader status]. There is no merit to plaintiffs' contention that the Japanese employer itself may confer that status upon any employee it chooses.

Id. at 565.

15 Section 1981 provides:

> All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

However, there is a split of authority among the courts which have considered the question whether claims of discrimination based on national origin are actionable under section 1981—a question, it appears, that the Second Circuit has not yet addressed. *Compare, e.g., Apodaca v. General Electric Company, supra; Vera v. Bethlehem Steel Corp., supra; Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186 (D. Md. (1977); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977); *Kurylas v. United States Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974), *aff'd*, 169 U.S. App. D.C. 58, 514 F.2d 894 (D.C. Cir. 1975), *with LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824 (D. Colo. 1978); *Ortega v. Merit Insurance Co.*, 433 F. Supp. 135 (N.D. Ill. 1977).

In *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975), the court reviewed carefully the legislative history of section 1981 and concluded that the section applies to discrimination based on race and alienage only. It then characterized the alleged discrimination against Spanish surnamed individuals as based on national origin and held that no action lay under section 1981. The court held

> that the provisions of 42 U.S.C. § 1981 *are limited in their application to discrimination, the effect of which is to deny to any person within the jurisdiction of the United States any of the rights enumerated in that section, to the extent that such rights are enjoyed by white citizens of this nation. Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute.*

68 F.R.D. at 15 (emphasis in original).[16]

16 Although the Supreme Court has not yet considered whether an allegation of national origin discrimination may be actionable under section 1981, it has extended the protection of that provision to "racial discrimination in private employment against white persons," 96 S. Ct. 2574, 2582, 49 L. Ed. 2d 493. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

A few courts have held that if national origin discrimination is motivated by or indistinguishable from racial discrimination, a claim will be actionable under section 1981.[17] However, even were this Court to find the *Jones* analysis unpersuasive, on the facts of the instant action it could not equate plaintiffs' claims that they have been discriminated against because they are *not* Japanese nationals with discrimination based on their race. Indeed, from a superficial perusal of the plaintiffs' names it appears that at least one of the plaintiffs is non-Caucasian. As plaintiffs have, and are exercising, an adequate remedy for redress under Title VII, there is no need for them to strain to fit their grievances into the mold of racial discrimination. The Court concludes that the plaintiffs' allegations of discrimination based on sex and national origin are insufficient to sustain a cause of action under section 1981 and that these claims should be dismissed.

The Counterclaims

Plaintiffs cross-move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Sumitomo's amended counterclaims for failure to state a claim upon which relief can be granted. Sumitomo counterclaims, first, for attorney's fees pursuant to 42 U.S.C. § 2000e-5(k) and punitive damages by reason of plaintiffs' "frivolous and spurious" institution of this lawsuit "in bad faith, vexatiously, willfully and wrongfully"; second, for damages by reason of plaintiffs' alleged abuse of the federal administrative and judicial

---

17 A number of courts have permitted Hispanic individuals to sue under section 1981 upon evidence that the alleged discrimination was racial in character. *See Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D. Okla. 1977); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186 (D. Md. 1977); *Cubas v. Rapid American Corp., Inc.*, 420 F. Supp. 663 (E.D. Pa. 1976). However, in *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977), an employee's allegation of discrimination based on his Slavic national origin failed to state a cause of action under section 1981. Similarly, an allegation of discrimination by a Polish-American failed to state a cause of action under this provision in *Kurylas v. United States Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974), *aff'd*, 169 U.S. App. D.C. 58, 514 F.2d 894 (1975).

process; third, for damages by reason of plaintiffs' common-law abuse of process; and fourth, for damages by reason of plaintiffs' tortious interference with Sumitomo's business operations.

For the reasons discussed below, the motion is granted as to the first counterclaim only. The remaining counterclaims, overlapping as Sumitomo's theories may be, satisfy the low threshold required to withstand a Rule 12(b) motion.

1. *Attorney's Fees*

Sumitomo, predicating its first counterclaim on section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), seeks recovery for attorney's fees expended to date and punitive damages for plaintiffs' wrongful conduct in commencing an allegedly spurious and frivolous Title VII action. Plaintiffs move to dismiss this counterclaim on the ground that section 706(k) will not support an independent claim for relief.

The question whether a defendant can request section 706(k) relief by way of counterclaim appears to be a novel one. The Court concludes that he cannot. Section 706(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." To treat this section as creating a separate cause of action is to ignore the words of the statute, which provide for reasonable attorney's fees to the *"prevailing party,"* in the context of an existing action or proceeding *"as part of the costs"* thereof. This language necessarily implies a finality that this litigation does not yet approach. Accordingly, the first counterclaim is not yet justiciable and does not state a claim upon which relief can be granted. It will be stricken without prejudice to Sumitomo's right to make later application to the Court for reasonable attorney's fees if the Title VII action is found to be frivolous or without foundation.[18]

---

18 In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 701 (1978), the Supreme Court defined the circumstances

II. *Abuse of Process*

The second and third counterclaims are based upon plaintiffs' alleged abuse of process in state and federal administrative and judicial proceedings. The gravamen of the tort of abuse of process is "misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish," Prosser, *Torts*, § 121, at 856 (4th ed. 1971), or, stated in another way, the tortious use of "legal process to attain some collateral objective." *Board of Education v. Farmingdale Classroom Teachers*, 38 N.Y.2d 397, 402, 380 N.Y.S.2d 635, 641, 343 N.E.2d 278 (1975). Sumitomo alleges that plaintiffs' purpose in bringing proceedings before administrative and judicial tribunals has been to coerce Sumitomo into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled. Such allegations clearly satisfy the intentional elements of the tort of abuse of process.

For purposes of a motion to dismiss, the court must accept the allegations of the complaint as true. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Hence Sumitomo is entitled to prove that the true intent of the plaintiffs was not legitimately to invoke the processes of the administrative agencies and the courts, but to coerce Sumitomo into yielding to their demands for promotion and higher pay. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

III. *Prima Facie Tort*

The intentional infliction of temporal damages without a legal motive—commonly referred to as prima facie tort—is a tort recognizable at law. *Smith v. Fidelity Mutual Life Insur-*

---

under which an attorney's fee should be awarded when the defendant is the prevailing party:

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

ance Co., 444 F. Supp. 594 (S.D.N.Y. 1978); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946). Its elements are: (1) the infliction of intentional harm (2) resulting in damages (3) without excuse or justification (4) by acts or series of acts that would otherwise be lawful. All must be established for the cause of action to be upheld. *Sommer v. Kaufman*, 59 A. D. 2d 843, 399 N.Y.S.2d 7, 8 (1st Dep't 1977).

In *Board of Education v. Farmingdale Classroom Teachers, supra*, the Board of Education brought an action against a teachers association and its attorney for abusing legal process by subpoenaing, with intent to injure and harass the school district, 87 teachers to compel their appearances at an initial hearing before the public employees' relations board and refusing to stagger the appearances, so that the school district was forced to hire 77 substitutes. The New York Court of Appeals held that the complaint stated a cause of action for both abuse of process and prima facie tort. Discussing the prima facie tort claim, the court stated:

> The operative fact here is that defendants have utilized legal procedure to harass and oppress the plaintiff who suffered a grievance which should be recognizable at law. Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.

38 N.Y.2d at 406, 380 N.Y.S.2d at 644, 343 N.E.2d at 284.

Sumitomo's fourth counterclaim alleges that by the institution of vexatious federal and state administrative and judicial proceedings and by disruptive and harassing activity in the office, plaintiffs deliberately and without justification inflicted temporal and economic harm upon Sumitomo. The Court concludes that this allegation satisfies the elements of prima facie tort and states a claim upon which relief can be granted.

IV. *Section 704(a)*

Finally, both plaintiffs and the EEOC, as amicus curiae, assert that the counterclaims must be dismissed because the filing of charges before the EEOC and the bringing of a Title VII suit are absolutely privileged. As the basis for this theory, they cite section 704(a) of Title VII, which forbids "discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796, 93 S. Ct. 1817, 1821, 36 L. Ed. 2d 668 (1973).[19]

The Supreme Court has declined to resolve the issue whether "the protection afforded by § 704(a) extends only to the right of access [to the EEOC and federal courts] or well beyond it." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 71 n.25, 43 L. Ed. 12 (1975). However, the Court has stated that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 803, 93 S. Ct. at 1825. In attempting to define the limits of protected conduct under section 704(a), lower courts have relied upon the *McDonnell Douglas* language to conclude that illegal activity and activity that unreasonably interferes with the employer's legitimate interests are not immunized by this provision. *See Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235, 1261 (3d Cir. 1978); *Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976). In *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 71-72 (S.D.N.Y. 1975), the court stated:

> Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his

---

19 42 U.S.C. § 2000e-3(a). That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliverate and unlawful conduct against the employer.

The Court concludes that the cases cited above are dispositive of plaintiffs' contentions of immunity. Sumitomo alleges not only that plaintiffs instituted spurious administrative and judicial proceedings, but also that plaintiffs have been disruptive in the office, have endeavored to sabotage Sumitomo's business, have engaged in calculated acts of insubordination, have urged other employees to violate their fiduciary duties to Sumitomo and have harassed and coerced those who would not, and have attempted to "purloin" confidential corporate documents. Affidavit of J. Portis Hicks, sworn to July 11, 1978, ¶ 9. Allegations of such aggressive and hostile tactics, which must be accepted as true for purposes of a Rule 12(b) motion, cannot be dismissed on the basis of section 704(a).

Accordingly, plaintiffs' section 1981 claims and defendant's section 706(k) counterclaim for attorney's fees are dismissed. All other motions are denied.

So ordered.

APPENDIX D

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

August 9, 1979

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

APPEARANCES

For Plaintiffs:
EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

Of Counsel:
LEWIS M. STEEL, Esq.

For Defendant:
WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

Of Counsel:
J. PORTIS HICKS, Esq.
LANCE GOTTHOFFER, Esq.

Amicus Curiae:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

Of Counsel:
ISSIE L. JENKINS
Acting General Counsel
JOSEPH T. EDDINS
Associate General Counsel
LUTZ ALEXANDER PRAGER, Esq.

TENNEY, *J.*

In this action for redress of alleged employment discrimination both parties have filed applications directed at the Court's Opinion and Order dated June 5, 1979 which denied dismissal of the instant Complaint and certain of the counterclaims and dismissed one counterclaim and one jurisdictional base asserted by the plaintiffs. The defendant seeks an immediate appeal under 28 U.S.C. § 1292(b), asking the Court to certify for appellate review the primary question posed in its original motion to dismiss; that is, whether the defendant is exempted under the terms of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan ("the Treaty") from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. The plaintiffs also make applications to the Court, first for a certification under section 1292(b) of the question whether their allegation of sex and nationality discrimination constitutes a valid cause of action under 42 U.S.C. § 1981, and second for reargument of this Court's refusal to dismiss certain

of defendant's counterclaims sounding in common law tort. The Court finds that only the question of the relationship between the Treaty and the civil rights law is suitable for section 1292(b) treatment. Therefore, the certification will be granted only as to that question and all other applications will be denied.

Section 1292(b) requires that a district judge

> making in a civil action an order not otherwise appealable under [section 1292 who is of] the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . shall so state in writing in such order.

The question whether defendant's employment practices are insulated from redress through civil rights actions is a pure question of law. If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation. Since there is a dearth of authority on the matter, this Court deems it prudent to follow the lead of Judge Bue of the United States District Court for the Southern District of Texas, who in *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979), faced almost the identical question as is here posed and certified the following question to the United States Court of Appeals for the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10. Although in contrast to *Spiess* there has been no class certification yet in the case at bar, the Court expects that the litigation will be sufficiently complicated that it would be a

waste of judicial time to try it with the novel jurisdictional question in limbo. Moreover, because the Court studied and rejected a Department of State opinion letter which construed the Treaty favorably to the defendant, *see* Opinion and Order at 9; *cf. Spiess v. C. Itoh & Co. (America), Inc., supra;* the instant matter now reflects the tension generated by the principle that "[c]ourts are to give substantial weight to the construction . . . which is placed upon the treaty by the political branch" although "they are not required to abdicate what is basically a judicial function." *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne,* 242 F. Supp. 129, 136 (E.D.N.Y. 1965). Therefore, the Court deems it wise to seek the instruction of the United States Court of Appeals for the Second Circuit and certifies that the interpretation of the Treaty poses a controlling question of law upon which the Court and the Department of State differ, the resolution of which will materially advance the prosecution of this case.

As for plaintiffs' application to certify the question whether 42 U.S.C. § 1981 applies to these civil rights claims, the Court sees no reason to grant interlocutory appeal. Any reversal on the section 1981 issue could not be made in a vacuum and construction of the Treaty could not be avoided in reaching that decision. Therefore, immediate appeal on section 1981 would be a superfluity, for if the court of appeals finds that the Treaty does not immunize the defendant from employment discrimination suits then the Title VII avenue will be adequate for plaintiffs to press their claims, and if the Treaty is found to protect the defendant then such immunization will be invoked whether the civil rights claim is filed pursuant to Title VII or to section 1981.

Finally, the plaintiffs again ask for dismissal of counterclaims 2, 3, and 4, seeking under Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York ("General Rules") to convince the Court that its refusal to dismiss those counterclaims was error. Although the Court sees nothing in plaintiffs' Memorandum of Law on Reargument that might be called "matters of controlling decisions which counsel believes the court has over-

looked," General Rule 9(m), in a Memorandum of Law submitted by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae the agency argues that *Harris v. Steinem,* 571 F.2d 119 (2d Cir. 1978), controls here, and in their Reply Memorandum of Law the plaintiffs adopt the EEOC position. The Court does not agree that *Harris* is dispositive. There the complaint alleged a violation of federal securities law, and the defendants counterclaimed for libel purportedly committed in the complaint itself and on subsequent occasions in published statements by the plaintiff. The district court found that the libel charge was a compulsory counterclaim, was therefore ancillary to the court's federal question jurisdiction over the complaint, and consequently was jurisdictionally valid despite the fact that it had no independent base of federal jurisdiction. The court of appeals disagreed, holding that the libel charge was not a compulsory counterclaim measured by the rule that analyzed "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Id.* at 123. Contrasting the issues to be proved in a securities case with those to be proved in libel, the *Harris* court found no overlap and called the logical relationship between complaint and counterclaim "at best attenuated," *id.* at 124, and dismissed for lack of jurisdiction.

This Court sees a distinction between, on the one hand, facts involving a sale of stock and a subsequent, purportedly libelous statement and, on the other hand, a claim of employment discrimination accompanied by an allegation of continuing retaliatory activity provoked by the policy complained of. In this case the defendant claims that

> prior to commencing [this action] . . . [the plaintiffs] entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' unreasonable demands for assignment to work for which they were not qualified and for payment of additional compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by injuring Sumitomo in its business and trade.

Answer and Counterclaim, ¶ 19. Defendant goes on to complain that "as part of carrying out their conspiracy, plaintiffs in bad faith vexatiously, willfully and wrongfully commenced sham administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York, and before the United States Equal Employment Opportunity Commission." *Id.*, ¶ 20. These are allegations that state a claim for malicious abuse of process, not—as in *Harris*—malicious prosecution. A counterclaim for malicious prosecution would be barred regardless of its compulsory or permissive nature because the tort is not actionable until the termination of the main action favorably to the defendant. By contrast, the tort of malicious abuse of process may be pleaded at any time because it does not rest on the course of a court proceeding. Moreover, the *Harris* court found that its counterclaim fell "within the well-established narrow line of decisions involving counterclaims based solely on the filing of the main complaint and allegedly libelous publication thereafter." *Id.* at 125. There is no such special niche for these counterclaims. They purport to involve pre-suit harassment by the plaintiffs and, beyond complaining of the motive behind bringing the instant case, the defendant complains of previous actions before governmental agencies brought for allegedly coersive purposes. Intimating no judgment on the merits of the counterclaims the Court adheres to its original finding that they have a logical relationship to the main action and meet the threshold test for stating a valid claim upon which relief can be granted.

The defendant's question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are denied.

So ordered.

Dated: New York, New York
August 9, 1979

CHARLES H. TENNEY
U.S.D.J.

APPENDIX E

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

November 29, 1979

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

APPEARANCES

For Plaintiffs:
EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

Of Counsel:
LEWIS M. STEEL, Esq.

For Defendant:
WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

Of Counsel:
JIRO MURASE, Esq.
J. PORTIS HICKS, Esq.
EDWARD H. MARTIN, Esq.
LANCE GOTTHOFFER, Esq.

Amicus Curiae:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

Of Counsel:
LEROY D. CLARK
General Counsel
JOSEPH T. EDDINS
Associate General Counsel
LUTZ ALEXANDER PRAGER
By: MARCIA B. RUSKIN, Esq.

Local Counsel:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
90 Church Street, Rm. 1301
New York, New York 10007
By: HARRAIN D. FIGUEROA, Esq.

TENNEY, *J.*

Defendant Sumitomo Shoji America, Inc. ("Sumitomo") has moved for reargument of the Court's denial of its motion to dismiss the claims against it, Opinion and Order dated June 5, 1979, reported at 473 F. Supp. 506 (S.D.N.Y. 1979). In its June 5 decision, the Court held, *inter alia,* that Sumitomo, as a United States subsidiary of a Japanese corporation, is not exempt under Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1975] 4 U.S.T. 2063, T.I.A.S. 2863 (effective October

30, 1953) ("the Treaty"), from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") against certain allegedly discriminatory employment practices. 473 F. Supp. at 509-13. The provision on which Sumitomo sought, and still seeks, to rely provides in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Article VIII(1). In not allowing Sumitomo—a United States subsidiary—to rely on that provision, the Court looked primarily to Article XXII(3) of the Treaty. Paragraph 3 provides:

> As used in the present treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.

(Emphasis added).

In moving for reargument of the June 5 decision, Sumitomo relies on documents recently released by the Department of State that purportedly bear on the intent of the negotiators of the Treaty. The Court grants the motion to reargue, but concludes that oral argument is unnecessary. The Court finds that the documents lend some support to Sumitomo's contentions, but does not find them sufficiently persuasive to alter its June 5 decision.

BACKGROUND

Additional Procedural Background

Pursuant to 28 U.S.C. § 1292(b), Sumitomo sought an immediate appeal of the Court's decision. The Court agreed to an immediate appeal, but limited its certification to the issue of

Sumitomo's standing under the Treaty's freedom-of-choice provision. Opinion and Order dated August 9, 1979, reported at ____ F. Supp. ____ (S.D.N.Y. 1979). Prior to filing a notice of appeal, Sumitomo requested this Court to withdraw its certification because the Department of State had on August 15 released documents that Sumitomo wanted the Court to consider. Letter from J. Portis Hicks to the Court, dated August 16, 1979. Because the ten-day period for filing a notice of appeal after certification was about to elapse, *see* Federal Rule of Appellate Procedure 5(a), Sumitomo filed its notice of appeal without waiting for action from this Court, but requested that the court of appeals stay any action until this Court had had a chance to consider the Department of State documents. On August 17, the court of appeals denied Sumitomo permission to appeal, but did so without ruling on the merits and without prejudice to renewal of the appeal after this Court had had the opportunity to consider the documents—in effect, a remand of the action to this Court. Order dated August 17, 1979 in No. 79-8460. Sumitomo subsequently moved for reconsideration of the Court's June 5 decision denying it standing under Article VIII(1). All parties have since been given the opportunity to file briefs on the effect of the Department of State documents on the Court's decision.

In its previous motion to dismiss, Sumitomo relied on an October 17, 1978 letter from the Department of State to the Equal Employment Opportunity Commission ("EEOC"). In the Department of State's view of the Treaty, as expressed in that letter, Sumitomo has the freedom of choice to fill all of its top management positions with Japanese nationals without being subject to Title VII sanctions. The Department of State drew no distinctions "between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company." *See* 473 F. Supp. at 511. The Court, in considering this letter, was mindful that the meanings given treaties by government departments charged with their negotiation and enforcement are given great weight. *Id., quoting Kolovrat v. Oregon,* 366 U.S. 187, 194 (1960). Nevertheless, it rejected the

meaning given the Treaty by the Department of State. "[I]n the absence of analysis or reasoning offered by the State Department in support of its position, this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1)" or to reject established principles of corporate law and applicable precedents. *Id.* at 511-12 (footnote omitted).

During the course of the briefing on this motion for reargument, the Department of State indicated that it had changed its view on whether the first sentence of Article VIII(1) of the Treaty (freedom-of-choice provision) covers United States subsidiaries of foreign corporations. Letter from James R. Atwood, Department of State Deputy Legal Adviser, to Lutz Alexander Prager, EEOC Assistant General Counsel, dated September 11, 1979, attached, *e.g.*, as Exh. 1 to Affidavit of Lewis M. Steel, sworn to September 17, 1979. Because of the importance of this letter in the consideration of this motion, it is set out at length:

> [T]he Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in *Spiess* v. *C. Itoh & Co.* [, 469 F. Supp. 1 (S.D. Tex.), *appeal docketed,* No. 79-2382 (5th Cir. 1979),] and two other cases more recently decided in the district court in New York (*Avigliano* v. *Sumitomo Shoji America, Inc.*, [473 F. Supp. 506 (S.D.N.Y. 1979),] and *Linskey* v. *Heidelberg Eastern, Inc.*, [470 F. Supp. 1181 (E.D.N.Y. 1979)].
>
> The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover

locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the *Itoh* case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Arguments

The positions of Avigliano, Sumitomo, and the EEOC may be stated briefly as follows. Avigliano argues that Sumitomo has no rights under the freedom-of-choice provision in Article VIII(1). Its foreign owner gave up those rights, as far as Sumitomo is concerned, when it chose to operate in the United States as a locally incorporated subsidiary rather than as a branch. The documents, in Avigliano's view, indicate that the Treaty was designed to ensure only national treatment for foreign controlled companies. They show that the intent behind the Treaty was not to exempt such companies from United States civil rights laws.

The EEOC, in its amicus brief, argues that the September 11 Department of State letter should be given great weight by the Court. The documents should not alter the conclusion reached by the Court in its June 5 Opinion and Order: Sumitomo's rights are governed by Article XXII(3), which provides that companies constituted under the laws of a particular country shall be deemed companies of that country. Accordingly, Sumitomo may be granted no greater or lesser rights than any other domestically created company. Moreover, Article VIII(1), even were it applicable, would not allow discrimination in favor of or against Japanese nationals or anyone else. Article VIII(1)

and Title VII and section 1981 are consistent: all three prohibit discrimination against anyone.

Sumitomo argues that the Court should disregard the September 11 Department of State letter because it, like the October 17, 1978 letter expressing a contrary view, offers no authority or reasoning in support of its position. Sumitomo argues that the Court should instead rely on the Department of State documents to establish the intent of the Treaty negotiators. It relies on these documents to establish that Sumitomo has standing under Article VIII(1), as an intended beneficiary, to assert freedom of choice in hiring certain personnel. The confusion, according to Sumitomo, results from the drafters' failure to distinguish clearly between provisions defining corporate nationality and those granting specific rights. Corporate nationality is not the intended test for determining standing under the Treaty, Sumitomo continues; Sumitomo—though technically a United States company—is entitled to specific rights under the Treaty, as purportedly demonstrated by the documents, because it is foreign-owned.

Documents

The documents released by the Department of State address negotiations and enforcement of this Treaty and similar treaties with other countries. The first document on which Sumitomo relies is a Department of State Airgram, signed "Kissinger" and dated January 9, 1976, to the American Embassy in Tokyo ("Kissinger Airgram"), Exh. A to Sumitomo Memorandum. The subject was the proper interpretation of Article XXII(3) of the Treaty. Because of the differing interpretations of the Kissinger Airgram, the Court sets it out in its entirety:

> Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth.
>
> Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who

formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting tests of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has

> nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.
>
> KISSINGER

Kissinger relied on a law review article by Herman Walker, Jr., "who formulated modern . . . form of [Friendship, Commerce and Navigation Treaty] and negotiated many FCNs." *Id.* Walker set out the definition of corporate status as found in Article XXII(3) of the Treaty. "Provisions on Companies in United States Commercial Treaties," 50 Am. J. Int'l Law 373, 380-81 & n.34 (1956). He thereafter explains that

> [t]he adoption of the simple test [of status and nationality by place of incorporation] has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledg-

> ment of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Id. at 383.

Kissinger also relied, as Sumitomo now does, on a Memorandum of Conversation from the Office of the United States Political Adviser for Japan, Tokyo, Despatch No. 13, April 8, 1952 ("Despatch No. 13"), Exh. E to Sumitomo Memorandum. In Despatch No. 13, at 5, quoted in small part in the Kissinger Airgram, the following portion of a discussion of Article XXII appears:

> [The Japanese representative] asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.
>
> [The U.S. representative] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Sumitomo also relies on a statement of a United States negotiator concerning treaty trader employees. The negotiator stated that Japanese treaty trader employees "would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm." Despatch No. 13, at 4. Sumitomo points to this language to demonstrate that the negotiators did not intend to distinguish between branches and subsidiaries regarding employment of treaty trader executives under the Treaty. It quotes from a document addressing a similar provision in a treaty then being negotiated between the United States and the Federal Republic of Germany.

> There is no intent . . . to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. . . . The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under . . . applicable regulations.

Department of State Instruction No. A-852 to HICOG, Bonn, January 21, 1954, at 1, Exh. 9 to Affidavit of Lance Gotthoffer, sworn to September 10, 1979 ("Gotthoffer Aff.").

Avigliano and the EEOC, in addition to arguing on the basis of the above documents, refer to other Department of State documents for the proposition that the Treaty negotiators did not seek to give foreign companies greater rights than those accorded domestic companies, but rather to ensure national treatment by barring employment discrimination against aliens. *E.g.*, Foreign Service Despatch No. 2529 from HICOG, Bonn to Department of State, March 18, 1954, at 1, Exh. 11 to Gotthoffer Aff. (the major special purpose of the freedom-of-choice provision "is to preclude the imposition of 'percentile' legislation").

DISCUSSION

Introduction

The issue on this motion for reconsideration is a narrow one. The Court is addressing the effect of the recently released Department of State documents on its June 5, 1979 Opinion

and Order. Specifically, by examining these documents, the Court seeks to determine whether, in the intent of the Treaty negotiators, Article XXII(3) bars Sumitomo from standing under the first sentence of Article VIII(1) or whether Sumitomo is otherwise barred from standing under that sentence. The issue whether Article VIII(1), if applicable, would insulate Sumitomo from review of any or all of its employment practices is beyond the scope of this opinion.

In determining whether Sumitomo has standing under the freedom-of-choice provision of Article VIII(1), the Court examines the Department of State documents and the terms of the Treaty to infer the intent of the parties to the agreement. *Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963). The Court should "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Id.*

The Department of State looked to the intent of the negotiators because it found that the "manner of coverage of subsidiaries is in many instances complex." Letter dated September 11, 1979, set out *supra.* After "an extensive review of the negotiating files" on the Friendship, Commerce and Navigation Treaties, the Department of State concluded that Sumitomo lacks standing under the first sentence of Article VIII(1). Sumitomo's rights are instead governed by Article VII(1) & (4), which provides for national and most-favored nation treatment. *Id.* The Court does give some weight to the Department's view on a manner within its purview, *see Kolovrat v. Oregon, supra,* but not decisive weight in this case. The Department undoubtedly gave the question serious and thoughtful attention, but the letter indicates neither the documents on which the Department relies nor its analysis. In the absence of either, the letter little aids the Court in its determination.

The issue of Sumitomo's standing under Article VIII(1) must be resolved on the terms of the Treaty and the documents—against the backdrop of the Court's prior decision. The documents raise doubt about the intent of the negotiators on the narrow question before the Court; accordingly, they render a

decision less certain. Nevertheless, the Court concludes that Sumitomo, while not denied all protection under the Treaty, does not have standing to rely on the freedom-of-choice provision.

Sumitomo's Standing Under the Treaty Generally

The terms of the Treaty support the proposition that Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty. The negotiators appear to have intended a distinction between the status and nationality attributes of a company as governed by Article XXII(3) and rights a company may claim under the Treaty's substantive provisions. In other words, Article XXII(3) cannot be read to the exclusion of the Treaty's other provisions. For example, Article VI(4) provides that

> enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

Subsidiaries also have rights under Article VII(1) & (4). Under Article VII(1), nationals and parties can

> organize companies under the general company laws of such other Party, and . . . acquire majority interests in companies of such other Party; and . . . control and manage enterprises which they have established or acquired. Moreover, enterprises which they control . . . shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Paragraph 4 of Article VII provides that "[n]ationals and companies of either Party, as well as enterprises controlled by

such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article."

The documents also support the distinction between a company's rights under the Treaty's substantive provisions and a company's nationality and status under Article XXII(3). Kissinger concluded that Article XXII(3) established a "procedural test" of an entity's status to determine "whether or not to recognize it as a 'company' for purposes of the Treaty." Kissinger Airgram. In his view, one then looks to the substantive provisions of the Treaty to determine the company's rights. *Id.* He concluded on the basis of this distinction that Japan could not deny treaty rights to a United States subsidiary set up in Japan. The substantive rights he chose as examples, however, do not support his conclusion directly. The examples all refer to the Treaty rights of nationals and companies, not to rights of the subsidiaries that they control. *See id.* Nevertheless, the distinction between "company" in the "procedural" and "substantive" senses lends support to Sumitomo's contentions.

In determining the intent of the Treaty negotiators, Kissinger looked to Herman Walker, a principal formulator and negotiator—according to Kissinger—of many Friendship, Commerce and Navigation Treaties. In the law review article quoted above—which was personal and not on behalf of the Department of State, 50 Am. J. Int'l Law at 373 n.—Walker set out the distinction between a company's civil attributes (status and nationality) and its functional or substantive ones. In a section entitled "Utilization of the Domestic Company Device," he gave a brief history of the right to organize and operate domestic companies. *Id.* at 386-88. He concluded that the treaties current at the time he was writing—including the Treaty with Japan at Article VII(1)—have revised the previous approach to rights regarding domestic companies in three ways. One revision was assuring the " 'controlled' domestic company . . . national treatment; discrimination against it in any way by reason of its domination by alien interests is not permissible." *Id.* at 388.

During negotiation of the Treaty, a United States representative suggested the same distinction between civil and substantive attributes by stating the limited purpose of Article XXII(3): "The recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party." Despatch No. 13, at 5. The same document suggests that subsidiaries have rights to hire treaty traders, *id.* at 4, as does Department of State Instruction No. A-852. The statements regarding treaty traders do not bear directly on the rights of the subsidiaries themselves, but they do suggest that subsidiaries have a place within the scheme of the Treaty and its implementing regulations. *See generally* discussion at 473 F. Supp. at 512-13.

Sumitomo's Claim of Standing Under Article VIII(1)

Articles VI(4) and VII(1) & (4), by their terms, give "enterprises in which nationals and companies . . . have a substantial interest" and enterprises controlled by nationals and companies, respectively, substantive rights. The drafter knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to "nationals and companies of either Party . . . within the territories of the other Party." Because the provision does not by its own terms extend to locally incorporated subsidiaries,[1] the Court must look to Article XXII(3) to determine whether "nationals and companies" can be read to include subsidiaries. That Article provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof." By this language Sumitomo is a United States company. It is not a Japanese company and is

1 Although nationals and companies have some employment rights in connection with enterprises in which they have financial interests, the subsidiaries themselves are not in any plain terms given employment rights.

thereby ineligible for freedom-of-choice protection within the territories of the United States.

The documents do not enable Sumitomo to escape this plain-term reading of the provision. They do not establish that the negotiators intended to give locally incorporated subsidiaries rights under the freedom-of-choice provision. A liberal reading of the Kissinger Airgram and its background suggest that he might have given a locally incorporated subsidiary rights under the freedom-of-choice provision. He did not, however, explicitly conclude that a subsidiary has such rights, nor did he refer to any documents that would establish such a right running to Sumitomo. In his law review article, Walker explained the difference between the civil attributes and the functional rights of a company, but he does not indicate that domestic subsidiaries have standing under Article VIII(1). He indicates only that such companies are entitled to national treatment—discrimination against it is impermissible. 50 Am. J. Int'l Law at 380-83, 385-88. Despatch No. 13 does not even discuss Article VIII(1), and its discussion of Article XXII(3) merely supports the proposition—discussed above—that that article does not by its own terms exclude subsidiaries from all substantive rights under the Treaty. Sumitomo has failed to point out any documents that directly support its claims under Article VIII(1).

Correction of August 9, 1979
Opinion and Order

On page 3 of its Opinion and Order dated August 9, 1979, ____ F. Supp. ____, the Court stated:

> If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation.

The Court need not, and does not, reach the question whether Article VIII(1), were it available to Sumitomo, would exempt Sumitomo from judicial review against any or all of plaintiffs' discrimination claims. The Court has no view on that issue, but in the language quoted above it suggested otherwise. Accord-

ingly, it deletes the quoted language from its August 9, 1979 Opinion and Order.[2]

Additionally, the word "seeks" on page 4 (second line from the bottom) of the August 9, 1979 Opinion and Order should be changed to "sees."

CONCLUSION

In summary, the Department of State documents support the conclusion that Article XXII(3) does not bar Sumitomo from standing under the Treaty generally. However, the Court reaffirms its conclusion that the terms of the Treaty do not give Sumitomo standing under Article VIII(1) and further concludes that the documents do not establish otherwise.

Finally, the Court directs that its August 9, 1979 Opinion and Order be amended in the manner indicated herein.

So ordered.

Dated: New York, New York
November 29, 1979

CHARLES H. TENNEY
U.S.D.J.

---

2 Much of the EEOC's brief is directed to the argument that the Treaty generally and Article VIII(1) specifically would not entitle Sumitomo, if it had standing, to more than national treatment. Walker, however, stated that the Treaty's employment rights "technically [go] beyond national treatment," 50 Am. J. Int'l Law at 386; *but cf. Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181, 1184-87 (E.D.N.Y. 1979) (under freedom-of-choice provision in treaty with Denmark, foreign corporation does not have absolute privilege to hire specialized personnel regardless of American laws prohibiting employment discrimination), but the Court does not reach the issue of the substantive scope of the Treaty's employment rights.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

April 24, 1981

Docket No. 79-2382

MICHAEL E. SPIESS, JACK K. HARDY and BENJAMIN F. ROUNTREE,

Plaintiffs-Appellees,

—v.—

C. ITOH & COMPANY (AMERICA), INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

COLEMAN, CHARLES CLARK and REAVLEY,
Circuit Judges.

CHARLES CLARK, *Circuit Judge*:

This interlocutory appeal presents an important issue of first impression in this circuit. C. Itoh & Company (America), a New York corporation wholly owned by a Japanese parent corporation, argues that a 1953 treaty between the United States and Japan permits it to hire only Japanese citizens for managerial and technical positions, in spite of American laws prohibiting discrimination on the basis of national origin. We hold that the treaty affords American subsidiaries of Japanese corporations the limited right to discriminate in favor of Japanese nationals in filling these positions.

I.

Michael E. Spiess and other American employees of C.Itoh-America filed a class action under Title VII of the Civil Rights Act and 42 U.S.C. section 1981. The complaint charged that the company had discriminated against its American employees by making managerial promotions and other benefits available only to Japanese citizens. C. Itoh-America filed a motion to dismiss, asserting that the Treaty of Friendship, Commerce and Navigation between the United States and Japan, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, precluded the plaintiffs' suit. Article VIII(1) of the Treaty provides that

> companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

C. Itoh-American argued that the language permitting companies to engage executive personnel "of their choice" cloaks the company with absolute immunity from American employment discrimination laws as to these positions.

The trial court denied C. Itoh-America's motion to dismiss, relying primarily on article XXII(3) of the Treaty. Under article XXII(3),

> [c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

The trial court reasoned that C. Itoh-America, a New York corporation, had been "constituted" under the laws of the United States. As a result, the court concluded that C. Itoh-America was a "company of the United States" under the plain meaning of article XXII(3), even though it was wholly owned by C. Itoh & Company, Ltd., a Japanese corporation. Because C. Itoh-America, in this view, was not a company of one party operating within the territory of the other, the trial court ruled that it could not assert the article VIII(1) right to choose executive personnel of its choice. See *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1, 6 (S.D.Tex. 1979). Upon a motion by C. Itoh-America, however, the district court permitted the company to take an interlocutory appeal. The following question was certified to this court under 28 U.S.C. section 1292(b):

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional and other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

II.

The Japanese Treaty is one in a long line of Friendship, Commerce and Navigation (FCN) treaties negotiated on a bilateral basis between the United States and other countries. Since the negotiation of the first FCN treaty with France in 1778, American diplomats have used the FCN device to establish the ground rules by which private commerce between American citizens and citizens of other countries is regulated.

See generally Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn.L.Rev. 805, 806 (1958) [hereinafter cited as *Modern Treaties*]. The FCN format is a flexible one, and it has been used at different times to serve different foreign policy goals. The central theme of the FCN treaty, however, has remained. An FCN treaty is the medium through which two nations provide "for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am.J.Comp.L. 229, 230-31 (1956) [hereinafter cited as *United States Practice*].

The FCN treaties, including the Japanese Treaty, are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation. *See Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.,* 494 F.Supp. 1263, 1266 (E.D.Pa.1980). Such treaties are "the supreme law of the land," and supersede inconsistent state law. U.S.Const. art. VI, cl. II; *United States v. Pink,* 315 U.S. 203, 230, 62 S.Ct. 552, 565-66, 86 L.Ed. 796, 817-818 (1942); *De Tenorio v. McGowan,* 510 F.2d 92, 95 (5th Cir. 1975). *See also Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.,* 248 F.Supp. 903, 910 (D.Or.1965) (Japanese Treaty is "supreme law of the land"). Even federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *The Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208, 226 (1804), *quoted in McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21, 83 S.Ct. 671, 678, 9 L.Ed.2d 547, 555 (1963). Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern. *Id.* Thus, unless federal civil rights laws reflect an affirmative disavowal of the rights provided by the Treaty, it is our duty to implement the treaty rights.

III.

The district court held that C. Itoh-America was an American company for the purposes of the Treaty, and thus could not assert the article VIII rights extended to Japanese corporations operating in this country. In the trial court's view, "[a]rticle XXII(3) unequivocally states that for the purpose of the Treaty the nationality of the corporation is determined by the place of incorporation." *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1, 6 (S.D.Tex.1979). We reject this construction of article XXII(3).

The district court's reading of article XXII(3) is compatible with the text of the Treaty, but it fails to account for the unique nature of an international agreement. Unlike domestic legislation, treaties must create a common ground between differing cultures before the rights of the parties can be defined. The negotiating history of the Treaty makes clear that article XXII (3) was designed for this purpose. A contemporaneous memorandum prepared by State Department negotiators demonstrates that the provision was intended, not to determine which forms of corporate organization were entitled to assert Treaty rights, but to ensure that unfamiliar organizations would be recognized as "companies" by the legal institutions of the respective countries. The memorandum noted the following colloquy:

> Mr. Nagai [a Japanese negotiator] then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph three [of article XXII] meant anything more than the recognition of the existence of a juridical person.
>
> Mr. Bassin [the American negotiator] replied that "juridical status" meant "legal status," the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph three, he added, meant merely the recognition by either Party of the existence and legal

> status of juridical persons organized under the laws of the other Party.

Dispatch No. 13, Office of the United States Political Advisor for Japan, dated April 8, 1952, at 5 [hereinafter referred to as Bassin Memorandum].[1]

FCN authority Herman Walker[2] has expressed a similar understanding of article XXII(3). In a 1956 article, Walker described the "distinct problems" encountered in defining "company" broadly enough to accommodate the varied purposes of an FCN treaty. Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am.J. Int'l L. 373, 380 (1956) [hereinafter cited as *Provisions on Companies*]. Walker noted that "[t]he standard definition is exemplified by Art. XXII, par. 3, of the 1953 Japan treaty." *Id.* at 380 n.34. In this definition, Walker explained,

> [a] "company" is defined simply and broadly to mean . . . any "artificial" person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit. Every association meeting this simple test of valid existence must be accounted by the other

---

1 The necessity for such a provision is well illustrated by another excerpt from the memorandum:

> Mr. Otabe inquired whether a *Zaidan Hojin* was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a *Zaidan Hojin* is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a *Zaidan Hojin,* he added, would be an endowed private library.
>
> Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Bassin Memorandum, at 5.

2 A State Department cable notes that Mr. Walker formulated the modern concept of FCN treaties and negotiated many treaties on behalf of the United States. Airgram from Secretary of State Kissinger to American Embassy in Tokyo, No. A 105, dated Jan. 9, 1976. Mr. Walker also served the State Department as Advisor on Commercial Treaties. *See United States Practice, supra,* at 229.

> party a company of the party of its creation, and have its juridical status recognized without any reservation for the laws of the forum.

Id. at 380-81. Walker also emphasized that there was a

> clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgement of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations.

Id. at 383. Thus, both the negotiators on location in Tokyo and the architect of the modern FCN treaty agree that article XXII (3) merely guarantees legal recognition to diverse forms of legal entities and does not determine which of those entities can assert treaty rights.

The Department of State has remained faithful to this interpretation of the Treaty. In a 1976 cable from Secretary Kissinger, the Department informed the American embassy in Tokyo that

> all that para 3 [of article XXII] is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i. e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

Airgram from Secretary of State Kissinger to American embassy in Tokyo, No. A 105, dated Jan. 9, 1976. A subsequent opinion from a State Department legal advisor reaches the same conclusion. Letter from Lee R. Marks to Abner W. Sibal (October 17, 1978). Thus, the consistent view of the State

Department has been that American subsidiaries of Japanese corporations are entitled to the full protection of the Treaty.[3] This view weighs heavily in our analysis.[4] *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218, 223 (1961).

---

3 Spiess calls to our attention a State Department letter of September 1979, in which a deputy legal advisor suggests that "it was not the intent of the negotiators to cover locally incorporated subsidiaries." Letter from James R. Atwood to Lutz Alexander Prager (September 11, 1979). This letter represents the first time, to our knowledge, that the State Department departed from the position expressed in the 1952 Bassin Memorandum, the 1976 Kissinger cable, and the 1978 letter by James Atwood. For this reason, we regard it as an aberration in State Department policy.

4 C. Itoh-America argues that State Department practice in administering the immigration laws is further evidence that Japanese subsidiaries incorporated in the United States are entitled to Treaty protection. The company argues that articles I, VII, and VIII of the Treaty should be read together to create a right of "companies of Japan" to employ Japanese citizens. Article I(1) permits Japanese citizens to enter and remain in the United States "for the purpose of carrying on trade between the territories of the two Parties." In C. Itoh-America's view, this right is implemented by section 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i) (1970), which grants foreign nationals special visa privileges to enter the United States as "treaty traders." The Department of State has granted treaty trader status to Japanese employees working for American subsidiaries of Japanese corporations. *See* 22 C.F.R. § 4140(a) (treaty trader must be employed by "an organization which is principally owned by a person or persons having the nationality of the treaty country"). C. Itoh-America concludes that the Department has permitted American subsidiaries of Japanese corporations to assert a right to entry under article I, and that it should be permitted to assert rights under article VIII as well.

Article I grants only a right to individuals to enter the country. C. Itoh-America can assert this right only as an adjunct of its own right to employ Japanese citizens. Thus, the argument depends on a unitary construction of articles I, VII, and VIII. The company has presented no evidence, other than the text of the Treaty and the immigration laws, that articles I, VII, and VIII were meant to be interpreted in this way. Walker lends some support to this theory. *See Modern Treaties, supra*, at 813 & n. 18. Nevertheless, because our decision that C. Itoh-America can assert Treaty rights is amply supported on other grounds, we need not, and do not, reach this issue.

Finally, we think that the district court's interpretation of article XXII(3) would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other. According to the district court, a company is considered a "company of Japan" for purposes of the Treaty only if it is incorporated in Japan. Under this analysis, American-incorporated subsidiaries of Japanese corporations would be entitled to Treaty protection only when they are specifically mentioned, and would not fall within the "companies of either Party" formula used throughout the Treaty. As the Second Circuit recently has observed, this would create a "crazyquilt pattern" in which branches of Japanese corporations would enjoy broad rights under the Treaty, while subsidiaries would be entitled only to minor protection. *See Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 at 556 (2d Cir.1981). In view of article VII's guarantee that companies shall be allowed to conduct business activities "through the medium of any form of lawful juridical entity," including both branches and locally organized subsidiaries, we agree that "[i]t is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation." *Avigliano, supra,* at 556; *cf. also United States Practice, supra,* at 233 (branches and local subsidiaries treated alike in Treaty).

We are aware that other courts have disagreed with our conclusion. The district court relied on *United States v. R.P. Oldham Co.*, 152 F.Supp. 818, 823 (N.D.Cal.1957), which held that article XXII(3) precluded American subsidiaries from asserting Treaty rights. *Cf. also, Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1263, 1265 n. 4 (E.D.Pa.1980) (standing issue raised but not decided). While their analysis may be supported by the literal text of article XXII(3), the clearly established intent of the parties to the treaty overrides such literalism. Accordingly, we hold that C. Itoh-America, a New York corporation wholly owned by a Japanese parent, may assert all rights extended to "companies of either Party" by the Japanese treaty.[5]

---

5 The dissent repeatedly characterizes our holding as a view that "the nationality of a company under the Treaty is to be determined by the

IV.

The parties also disagree as to the scope of the rights established by the Treaty. According to C. Itoh-America, article VIII(1) provides the company with an absolute exemption from American employment discrimination laws. On its face, article VIII(1) seems to confirm this view. It provides that "companies of either Party shall be permitted to engage . . . executive personnel . . . of their choice." We are mindful, however, especially after our treatment of article XXII(3), that the apparent plain meaning of a treaty provision may not always reflect the provision's actual purpose. Spiess argues that a literal reading of the "of their choice" provision would fly in the face of the Treaty's general policy. In his view, article VIII(1) provides only national treatment to Japanese corporations. After a thorough examination of the structure of the Treaty and the setting in which it was negotiated, we hold that article VIII(1) does exempt C. Itoh-America from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions.

---

nationality of its shareholders." *E. g., post,* slip op. at 6357, at ____. This is not the holding of the court. Rather, we assert that article XXII(3) provides no explicit definition of "company of either Party," just as it provides no definition for "national of either Party," another oft-used Treaty expression. Our conclusion that C. Itoh-America is a company of Japan for Treaty purposes is based, not on the application of an explicit test conjured up from the text of the Treaty, but on the clearly expressed intent of the parties to extend Treaty protection evenly to subsidiaries whether unincorporated or incorporated under the law of either Party. We do not reach or decide whether a corporate subsidiary in which a Japanese trader owns less than a 100 percent interest should be considered a company of Japan under the Treaty.

Under a proper understanding of our holding, Judge Reavley's views, though reasonable, lose much of their force. We agree with Judge Reavley that the Acheson and Kissinger cables belie the view that the Treaty establishes a test of corporate nationality based on the nationality of the shareholders. We disagree, however, with the suggestion that these cables convert the language of article XXII(3) into a definitive test of the Treaty term "companies of either Party."

A.

The Japanese Treaty belongs to a group of sixteen treaties negotiated in the years immediately following World War II. These treaties share the salient characteristics of FCN treaties, but they reflect several innovations designed to adapt the FCN device to the realities of modern international commerce. Thus, these treaties extended explicit protection to corporations, as well as to natural persons. *See Provisions on Companies, supra* at 380. The animating purpose of American treaties of this period was to provide a stable environment for private international investment. *See United States Practice, supra,* at 231.

Under the post-war treaties, the rights of foreign nationals operating in the host country were measured, for the most part, by two so-called "contingent standards." *Modern Treaties, supra,* at 810-11. Under the first standard, foreign nationals were guaranteed "national treatment," that is, the same treatment afforded to native citizens. The national treatment standard was viewed as a progressive one by American diplomats, and negotiators sought, whenever possible, to use it as the measure of a foreigner's rights in the host country. *Id.* The Japanese Treaty reflects this effort, and guarantees its signatories "national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities." Treaty, art. VII(1); *see also* art. III (national treatment in pension and social security laws); art. IX(1)(a) (national treatment in leasing, occupying, and using property).

The nationalistic fervor of the post-war era, however, prevented universal application of the national treatment rule. Thus, in sensitive areas where the host country could not ignore the divided loyalties of foreigners—areas such as shipbuilding, or domestic air transport—a second standard was used. Under this standard, foreign nationals were guaranteed "most favored nation" treatment, or treatment as favorable as that enjoyed by the citizens of any foreign nation. *See United States Practice, supra,* at 236. Thus, article VII(2) of the Japanese Treaty provides most favored nation treatment for

foreigners who seek to operate a public utility in the host country, or who would engage in shipbuilding, air or water transportation, deposit banking, or exploitation of land and natural resources. *See also* art. XIII (most favored nation treatment for foreign travelers entering and leaving country); art. XIV(5) (most favored nation treatment in matters of export and import).[6]

Although the two contingent standards were widely used in the post-war FCN treaties, they were not the exclusive means by which the rights of foreigners were protected. As Walker has observed, there was also "a certain margin for the play of non-contingent standards, or 'absolute' rules in the formulation of treaty provisions." *Modern Treaties, supra,* at 811. Absolute rules were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population. *Id.* at 823. According to Walker, foreign nationals were to receive "not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens." *United States Practice, supra,* at 232. The use of absolute rules is well illustrated in the Japanese Treaty. Article I permits foreign nationals to enter and leave the host country, and provides for rights of free travel, liberty of conscience, religious freedom, and other personal rights. By the same token, article II(2) provides for notification of an alien's consulate in the event he is arrested, article VI(3) guarantees the payment of just compensation for expropriated property, and article XX(a) allows nationals of one party freedom of

---

6 Although the most-favored-nation standard was considered less desirable than national treatment at the time the Japanese Treaty was negotiated, it was used in previous treaties to confer special privileges on aliens. *See Modern Treaties, supra,* at 811. As a result, the national treatment and most-favored-nation standards were often used in conjunction, even in the post-war treaties, to guarantee that foreigners would benefit from the most extensive protection in every case. *See e.g.,* Treaty, art. IV(1) (companies of either party "accorded national treatment and most-favored-nation treatment with repect to access to the courts of justice").

transit by the most convenient route through the territory of the other party.

B.

Spiess argues that the "of their choice" provision of article VIII(1) should be read to grant national treatment to companies of either party. In his view, this reading would comport well with the Treaty's emphasis on national treatment; he finds it incongruous that a treaty providing for equal treatment of all parties could be used to provide special privileges to foreign nationals in the host country. This view recently was adopted by the Second Circuit in the *Avigliano* case. *See Avigliano v. Sumitomo Shoji America, Inc., supra,* at 559. A district court in the Second Circuit had previously applied the same theory to the Danish FCN treaty, which includes a similar provision. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F.Supp. 1181, 1185-86 (E.D.N.Y.1979).

We agree that an overriding goal of the Treaty negotiators was to provide national treatment to foreign businesses operating in the host country. However, national treatment was not the Treaty's exclusive measure of the rights to be accorded to foreign nationals. It is apparent that article VIII(1)'s "of their choice" provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments. As we noted above, absolute rules played a significant role in defining the rights of parties. The language of article VIII(1) makes clear that the "of their choice" provision was designed to establish such a rule. Use of the phrase "of their choice" does not express the requirement that the parties are limited to national treatment. This is accentuated by the fact that the phrase "nationals of either Party shall be accorded national treatment" appears repeatedly in other provisions of the Treaty. Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and techni-

cians will manage their investment in the host country, without regard to host country laws.

Our understanding of article VIII(1) is reinforced by Walker and the negotiating history of the Treaty. In discussing immigration rights under the FCN treaties, Walker notes that,

> firm rights are provided for the entry and indefinite sojourn of international traders and principal investors. Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from "percentile" restrictions and the like.

United States Practice, supra, at 234. In a footnote, Walker identifies article VIII(1) as an example of this kind of provision. *Id.* at 234 n. 15. Walker also explains that "[i]n the matter of employment, provisions have been developed technically going beyond national treatment, to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." *Provisions on Companies, supra,* at 386. Again, Walker identifies the Japanese Treaty as an example of this principle, and continues in a footnote to point out that article VIII(1) allows "free choice" in the selection of specialized personnel. *Id.* at 386 n. 62.

Despite the clear evidence that article VIII(1) was intended to go beyond national treatment, Spiess insists that, if it is broader, it does not go far enough beyond national treatment to immunize C. Itoh-America from American employment discrimination laws. According to Spiess, if the "of their choice" provision goes beyond national treatment, it does so only to protect Japanese companies from state laws that restrict the activities of aliens employed in the United States. In this view, article VIII(1) would protect C. Itoh-America from "ultranationalistic" state laws discriminating against Japanese citizens, but not from federal laws forbidding the company

itself to discriminate. In much the same vein, the Second Circuit held that the Treaty could be interpreted to be consistent with the nation's employment discrimination laws. *See Avigliano, supra,* at 559. The Equal Employment Opportunity Commission also raised this possibility in an amicus curiae brief submitted in this case. Under this theory, the Title VII exemption for bona fide occupational qualification (bfoq) requirements is broad enough to encompass any rights that Japanese corporations legitimately could assert under the Treaty.

Although the Treaty and commentary offer some support for this point of view, the argument misapprehends the nature of a right created in the course of international bargaining. From the American perspective, the Japanese Treaty was "intended primarily to facilitate American private-sector investment in foreign nations." *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.,* 494 F.Supp. 1263, 1267 (E.D.Pa.1980); *Avigliano, supra,* at 556; *see United States Practice, supra,* at 231. The article VIII(1) right to free choice of technical and managerial personnel sought to ensure that the American businessman's investment in the host country would remain within his control. The legislative history cited to us by C. Itoh-America demonstrates that the Senate, in consenting to ratification of the Treaty, was concerned about the right of American companies to use American personnel to control their investments in Japan. *See Commercial Treaties—Treaties of Friendship, Commerce & Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan: Hearings before the Subcom. of the Senate Comm. on Foreign Relations,* 83d Cong., 1st Sess. 2, 3, 6-9 (1953). It is self-evident that this same goal of American negotiators in formulating article VIII(1) was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States.

Clearly, article VIII(1) provides some right to Japanese companies to manage their own affairs.[7] It is irrelevant

---

7 Even *Avigliano* concedes that "the clause 'of their choice' was also intended, in furtherance of the overall purpose of the Treaty, to

whether the source of potential interference with that right is state legislation characterized as "ultranationalistic" or a federal statute labeled "progressive." The right of Japanese companies to choose essential personnel is a right to maintain Japanese control of the overseas investment. To make this right subject to Title VII's bfoq requirements, or to interpret it to override only state law, would render its inclusion in the Treaty virtually meaningless. Thus, we hold that the article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.[8]

Title VII was enacted after the Treaty, and thus might be thought to nullify inconsistent principles of domestic law created as a by-product of the Treaty. The general rule is that subsequent federal legislation will invalidate treaty obligations if the congressional intent to do so is clearly expressed.[9] *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21, 83 S.Ct. 671, 678, 9 L.Ed.2d 547, 555

---

facilitate a party's employment of its own nationals to be the extent necessary to ensure its operational success in the host country." *Avigliano, supra,* at 559.

8 Spiess suggest that implementation of the article VIII(1) right would permit companies like C. Itoh-America to violate, not only Title VII, but also labor relations statutes and laws preventing exploitation of workers and practices such as child labor. The Second Circuit has expressed a similar concern. *See Avigliano, supra,* at 559. C. Itoh-America, on the other hand, argues that the "of their choice" provision entails a broad immunity from all domestic employment legislation. The extent to which this principle applies outside the context of national origin discrimination is unclear. *See* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan.L.Rev. 947, 955 (1979). We need not decide in today's case whether the article VIII(1) right extends beyond discrimination in favor of Japanese nationals in executive and technical positions, supervisory jobs which would hardly be filled by union members, minors or exploited workers. We note only that article VIII(1) is based on the principle of home office control of the foreign investment.

9 Spiess and his fellow plaintiffs filed suit under section 1981 as well as under Title VII. Because the Treaty was ratified after the enactment of section 1981, it supersedes the federal statute. *See Hijo v. United States,* 194 U.S. 315, 324, 24 S.Ct. 727, 729, 48 L.Ed. 994, 996 (1904).

(1963). No evidence suggests that Congress intended to repudiate article VIII(1) when it enacted Title VII. Domestic employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation.

Spiess raises an additional argument which merits attention. He contends that any right to discriminate afforded by the Treaty is contrary to the Charter of the United Nations and thus is invalid because it is in conflict with higher law. Spiess points out that article 55 of the Charter encourages "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Spiess argues that this language prohibits the United States and Japan from agreeing to allow each other's businesses to hire fellow citizens when operating in the other country.

We note initially that the national origin distinction at issue in this case does not fall within the enumerated categories of "race, sex, language or religion." In any event, the Charter of the United Nations, although adopted by the United States, is not a self-executing international obligation. *Hitai v. Immigration and Naturalization Service,* 343 F.2d 466, 468 (2d Cir. 1965); *Davis v. District Director, Immigration and Naturalization Service,* 481 F.Supp. 1178, 1183 n. 7 (D.D.C.1979). Spiess argues that even though the Charter is not self-executing, Title VII was enacted to implement its provisions, and thus partakes of the *lex superior* characteristics of the Charter. We do not agree. Title VII is legislation independent of the Charter. It was enacted in the domestic interest of the nation. It thus possesses no overriding authority and does not, of its own accord, invalidate antecedent treaty obligations of the United States.

V.

In summary, we hold that C. Itoh-America may assert article VIII(1) rights under the Treaty, and that those rights permit it to hire only Japanese personnel for executive and technical positions. The opinion of the district court is reversed, and the case is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

REAVLEY, *Circuit Judge,* dissenting:

The majority opinion concludes that C. Itoh-America is exempt from the requirements of Title VII of the Civil Rights Act of 1964 because article VIII(1) of the FCN Treaty between Japan and the United States grants to "companies of [Japan]" the right to hire executive and technical personnel "of their choice." Obviously, this conclusion depends upon the finding that a company incorporated in the United States and doing business here is nevertheless a "company of Japan" merely because it is owned by a Japanese parent corporation. In my view, the drafters of the Treaty created in article XXII(3) a precise definition for the term "company of [Japan]," clearly stating that a corporation has the nationality of its place of incorporation. That interpretation of the article is consistent with the other provisions of the Treaty, while the majority view creates substantial inconsistencies and redundancies. Furthermore, secondary sources of the highest authority support the conclusion that C. Itoh-America is a company of the United States and not of Japan.

I. The Article XXII(3) Definition

The drafters of the Treaty wanted to distribute the benefits of commercial exchanges between the United States and Japan broadly and expediently. In choosing the terminology of the document that would achieve this end, they faced the historical

and cultural fact that Japan and the United States had developed widely diverse forms of commercial organization.[1] The drafters thus chose to avoid problems of semantics by adopting only two basic terms of art to describe the commercial entities indigenous to each nation: "nationals of either Party" and "companies of either Party." The term "nationals" obviously covers individual businesspersons and entrepreneurs having United States or Japanese citizenship. The term "companies" is specifically defined in article XXII(3) of the Treaty to include *every* form of business association: "As used in the present Treaty, the term 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Article XXII(3). The Treaty also recognized a third form of business entity that is likely to come into existence when, for example, a national or company of Japan[2] enters the United States under the broad commercial and legal rights established by the Treaty. That third entity is the individual proprietorship or company (in the broad Treaty sense) that is *formed in the United States,* does business here, and yet is owned and controlled, in whole or part, by a national or company of Japan. The treaty's term of art for this third form of international commercial activity is "enterprises controlled by nationals and companies of [Japan]."[3] The Treaty generally distributes rights among private parties by specific reference to one or more of these three forms of commercial entities.

---

1 For example, the Bassin Memorandum records an exchange between Mr. Bassin and Mr. Otabe, one of the Japanese representatives, as to whether a *zaidan hojin* would be considered a "company" under the Treaty. A *zaidan hojin* is a juridical person charged with the duty of using or employing certain property for a public purpose, such as an endowed public library. Bassin Memorandum at 5.

2 I will not attempt to use neutral terms at all points but will occasionally discuss the Treaty only in terms of the right it confers upon Japan to do business in the United States. I adopt this convention for simplicity of expression and because that choice embodies the specific legal question we face in this case.

3 See the Treaty sections quoted in notes 6-10 below.

But the term "company of [Japan]" is not completely defined merely by saying that every form of business association shall be deemed a company under the terms of the Treaty. Thus article XXII(3) continues in a second sentence to specify, first, the test of when a corporation may claim nationality from either Japan or the United States and, second, when a juridical entity entitled to be called a "company" comes into existence: "Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party" (emphasis added).

The first purpose of this sentence, to define a test of corporate nationality, is addressed by the simple phrase placed in italics. The second purpose, to define the creation of a juridical entity that must be recognized as a "company", is addressed by the remainder of the sentence after the italicized phrase. The two purposes become conceptually muddled, especially in some of the documents cited by the majority, only because they coincide in one event: when either nation creates a company under its own laws, that company has the nationality of the creating nation and must be recognized as a juridical entity by the other nation.

The primary flaw in the majority's analysis is that it ignores the existence of the phrase "shall be deemed companies thereof" in article XXII(3). The majority argues that the only purpose of this article is to determine when the juridical entity designated as a "company" exists. I agree that is *one* purpose of the article, but the phrase "shall be deemed companies thereof" is totally unnecessary to that end. What is the meaning of this phrase if not to determine corporate nationality for the purposes of the Treaty? If the majority rejects the plain meaning of this phrase, it has three initial problems. The first is to say what this phrase *does* mean. The second is to explain how the drafters could fail to specify an answer to a question as important as the determination of corporate nationality,[4] for

4 The importance of the term "company of [Japan or the United States]" is shown by the fact that it is used at least 40 times in the

the issue is certainly addressed nowhere else in the Treaty or Protocol. The third problem is that the majority must justify its own conclusion that the nationality of a corporation is to be determined by the nationality of some unspecified percentage of shareholders,[5] because this test is only one of several other possibilites, and the majority cites no authority for its own choice. For instance, an international corporation could claim nationality based upon place of incorporation, nationality of shareholders, place of principal office, place of principal assets, derivation of income, or any combination thereof. International law has for many years resolved this complex question with the principle that an international corporation has the nationality of its place of incorporation.[6] Article

---

Treaty and Protocol. Article XXI(1)(e) is another indication that the drafters were highly sensitive to the issue of corporate nationality. That section addresses the possibility that nationals of third countries might try to gain Treaty rights illegitimately merely by incorporating in Japan or the United States. That article is fully discussed in section II.B. of this dissent.

5 The majority states in footnote 5 of their opinion that they do not mean to establish a general test of corporate nationality under the Treaty. This may reserve a question of *degree* or *quantity*, but the effect of their construction of the Treaty is nevertheless to derive the nationality of a company from the nationality of the controlling shareholders.

If the majority means to imply that they might reach a different test of corporate nationality if a company were only 70% (or 51% or 40%) owned by Japanese interests, they make the Treaty even more ambiguous and vague.

6 The principle was clearly stated in the celebrated decision of the International Court of Justice in Barcelona Traction, Light and Power Company, Limited *(Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 42:

> In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.

(footnote continued on next page)

XXII(3) certainly appears to follow this well established principle and if the majority rejects that view, it must justify its own choice.

II. Analysis of the Treaty Structure and Articles

Anyone doubting that article XXII(3) was intended to specify that a corporation has the nationality of its place of incorporation should examine the Treaty structure and the internal consistency of the other articles. The results of such an analysis confirm that article XXII(3) means exactly what it says.

A. The Basic Terms of Art

To begin with the basic semantics of the Treaty, the drafters consistently used three terms of art to allocate benefits among private parties, "nationals of [Japan or the United States]," "companies of [Japan or the United States]," and "enterprises controlled by such nationals or companies." The very creation of these three terms of art is a strong indication that the drafters viewed each as representing a distinct entity. Yet under the majority view a company incorporated in the United States but controlled by a Japanese national or company (which I will refer to as a "Japanese-controlled American company") is already a "company of Japan." That view equates the latter two terms, deprives the last term of all meaning and purpose, and creates the additional confusion and redundancy that I will discuss below.

B. Provisions Based on the Place of Incorporation Test

Two articles of the Treaty are clearly based on the assumption that a company has the nationality of its place of incor-

---

Dr. Herman Walker, the FCN authority so heavily relied upon by the majority, has called this the "simple 'classical' test" of corporate nationality. H. Walker, *Companies*, ch. VII, in R.R. Wilson, *United States Commercial Treaties and International Law* 182, 193 (1960).

poration. The first is article VII(1), which the State Department identified as the "heart of the treaty." Airgram from the State Department to the American Embassy in Tokyo, No. A 453, dated January 7, 1952. The first sentence of that article says,

> "Nationals and companies of [Japan] shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other business activities within the territories of the [United States], whether directly or by agent or through the medium of any form of lawful juridical entity."

The final sentence says,

> "Moreover, enterprises which [nationals and companies of Japan] control, whether in the form of individual proprietorships, companies, or otherwise shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of [the United States]."

There is a subtle difference between the degree of rights conferred by these two sentences. The first sentence says that nationals and companies of Japan doing business within the United States are entitled to equality of treatment with nationals and companies of the United States, expressed in the term of art common to such treaties, "national treatment." The second sentence, however, does not confer simple "national treatment" on Japanese-controlled American companies, but a narrower right: equality of treatment with subsidiary enterprises controlled by nationals and companies of the United States. I will call this "national subsidiary treatment." This specific grant of a narrower right to Japanese-controlled American corporations makes sense only if such a corporation is a company of the United States. If it were already a company of Japan, it would have gained full "national treatment" from the first sentence of article VII(1), which would defeat the subsequent grant of a narrower right.

Article XXI(1)(e) of the Treaty also indicates that the nationality of a corporation is normally to be determined by its place of incorporation. This article provides as follows:

> The present Treaty shall not preclude the application of measures . . . denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.

I read this to mean that, although a company incorporated in Japan may normally claim all the privileges of a "company of Japan" while doing business in the United States, if the United States discovers that nationals of a third country own the Japanese company, the United States may deny the benefits of the Treaty to such company, with the listed exceptions. For instance, if a company incorporated in Japan is in fact owned and controlled by North Korea, the United States may "pierce the corporate veil" and prevent North Korea from gaining broad commercial rights within the United States by such devious means. If the majority were correct in saying that a corporation under the Treaty has the nationality of its controlling shareholders, a Japanese company controlled by nationals of North Korea would not be a company of Japan to begin with, and there would be no need for this explicit and exceptional reservation of authority by both countries.

C. Specific Inclusions of Controlled Enterprises

Under normal principles of statutory interpretation, if a party or item is specifically enumerated in one section of a statute but omitted from a similar enumeration in a closely-related section, the exclusion is held to be intentional and meaningful unless plain reason or authoritative sources indicate otherwise. Articles VII(1),[7] VII(4),[8] XVI(2),[9] VI(3) (read

7 Article VII(1) reads as follows:

in conjunction with paragraph 2 of the Protocol),[10] and VI(4)[11] grant express rights to "nationals and companies of either

---

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, *enterprises which they control, whether in the form of individual proprietorships, companies or otherwise,* shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party (emphasis added).

8 Article VII(4) reads as follows:

Nationals and companies of either Party, *as well as enterprises controlled by such nationals and companies,* shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article (emphasis added).

9 Article XVI(2) reads as follows:

Articles produced by nationals and companies of either Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies,* shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use (emphasis added).

10 Article VI(3) reads as follows:

Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article VI(3) is extended by paragraph 2 of the Protocol, which was specifically incorporated into the Treaty as follows:

Party" operating in the territory of the other party and then *specifically extend* the same or similar rights to "enterprises controlled by such nationals or companies." Other articles that are directly adjacent, including the article VIII(1) provision upon which C. Itoh-America seeks to rely, extend rights only to "nationals and companies of either Party" and make no mention of controlled enterprises. This is especially significant in relation to article VIII, which the State Department considered the "companion" to article VII. Airgram from the Department of State to the American Embassy in Tokyo, No. A 453, dated January 7, 1952. The majority would interpret such distinctions as being purely haphazard. I am unable to accept that view when the negotiating documents and historical context of the Treaty indicate that it was crafted with the greatest care.

Furthermore, the specific inclusion of controlled enterprises in the five articles listed above becomes completely redundant if Japanese-controlled American companies are already companies of Japan, because in each article the right has previously been extended to companies of Japan. One could argue that the additional extension of the rights to controlled enterprises

---

The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to *interests held directly or indirectly by nationals and companies of either Party* in property which is taken within the territories of the other Party (emphasis added).

11 Article VI(4) reads as follows:

Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraph 2 [relating to the right to be free from unlawful entry, molestation, and search] and 3 [relating to right to be free from condemnation of property except for a public purpose, and right to compensation therefor] of the present Article. Moreover, *enterprises in which nationals and companies of either Party have a substantial interest* shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control (emphasis added).

in these five articles was only done out of an excess of caution, to address a perceived ambiguity or possible misunderstanding. Yet if that were the case, surely the drafters would have either exhibited the same caution in adjacent articles, such as article VIII(1), or devoted similar effort to correct the ambiguity at its source, by specifying that a Japanese-owned American company is nevertheless a "company of Japan." The majority sees a "crazyquilt pattern" in the Treaty if a Japanese-controlled American company is not a company of Japan, a characterization that I dispute in the next part of this dissent. But the majority has its own "crazyquilt pattern" to explain in these five Treaty articles that, under the majority view, blatantly duplicate grants of rights.

D. The Pattern of Rights Distribution

The numerous redundancies and ambiguities discussed above are all created by the distortion of article XXII(3) urged upon us by the majority. In contrast, if we simply read that article in accord with its plain meaning, all of these problems disappear and each of these sections becomes a concise, appropriate, and meaningful extension of valuable rights to American business enterprises controlled by nationals or companies of Japan. But the majority maintains, along with the Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), that this reading of article XXII(3) "would create a 'crazyquilt pattern' in which branches of Japanese corporations would enjoy broad rights under the Treaty, while subsidiaries would be entitled only to minor protection." The majority finds it "illogical to infer that the drafters of the treaty intended to make such a dramatic distinction between forms of business operation," quoting *Avigliano*, 638 F.2d at 556.

I find these generalities either inaccurate or too broad. First of all, if the rights conferred on companies of Japan by this Treaty were assigned a weighted value, one right would probably far outweigh all others: the article VII(1) grant of "national treatment with respect to engaging in all types of . . . business

activities." Article VII(1) specifically extends this right of national treatment to Japanese-controlled American companies, in a narrower form of little practical significance.[12] It is therefore inaccurate to say that such a company gains only "minor protection" from the Treaty. The broadest and most important right granted by the Treaty, outweighing all others combined, is shared on a virtually equal basis by companies of Japan and their American subsidiaries.

Secondly, a close examination of the Treaty shows that the "crazyquilt pattern" seen by the majority is not as dramatic as they seem to think. Only about 20 paragraphs of the Treaty confer rights on "companies of [Japan]" without specifically extending the same right to American enterprises controlled by such companies.[13] Almost all of these 20 paragraphs confer rights that would fall into one or more of the following categories:

(1) The right is so essential to the conduct of business activities that any reasonable interpretation of the Treaty would hold it to be already conferred on American subsidiaries of Japanese companies by the general article VII(1) grant of "national subsidiary treatment" in all business activities;[14]

(2) The right is separately protected by the Constitution of the United States, and could therefore never be denied to an American subsidiary of a Japanese corporation under any circumstances;[15]

---

12 See the discussion in part II.B. above.

13 See articles IV(1), (2); V(1); VI(1), (2); VIII(1), (3); IX(1), (2), (3), (4); X; X(1), (3), (4); XII(1), (4); XIV(5); XV(2); and XVII(2).

14 See, e.g., articles IX(1) (right to lease land and buildings appropriate to conduct of activities otherwise permitted under Treaty), IX(2) (right to acquire movable property), IX(4) (right to dispose of property), and XI(1) (right to be taxed on a basis equal to national corporations).

15 See, e.g., articles IV(1) (right of access to courts and administrative bodies), VI(1) (right to protection of property within the host country), VI(2) (right to be free from unlawful entry, molestation, and search), and IX(3) (right to dispose of property within 5 years if laws of testate or intestate succession prevent national treatment).

(3) The right is so fundamental to the design of our commercial and legal system that it would never be denied to American subsidiaries of United States companies, and therefore could not be denied to American subsidiaries of Japanese companies because of the article VII(1) grant of "national subsidiary treatment."[16]

I have cited examples in footnotes. My point is only that the Treaty rights of a company of Japan and its American subsidiary are virtually identical *in practice.* I acknowledge that the conceptual structure of the Treaty is not entirely apparent or logical in relation to these 20 paragraphs.[17] But the distinctions make little *practical* difference.

I can identify only one provision of the Treaty that, in practical and significant terms, is likely to cause a divergence between the Treaty rights of a Japanese-controlled American company and its Japanese parent corporation. That one provision is the article VIII(1) right from which C. Itoh-America seeks protection in this litigation. Assuming that article VIII(1) does, in fact, grant to "companies of [Japan]" an exemption from the requirements of our civil rights legislation,[18] then a Japanese-incorporated company doing business in the United States may discriminate in favor of its Japanese managerial and technical employees to the detriment of American employees,[19] while the American-incorporated subsidiary of that same

---

16 See, e.g., articles XII(1) (right to transfer funds and instruments outside the United States), XIV(5) (right to import and export), XV(2) (right to have an appeals procedure from administrative decisions in relation to customs matters), and XVII(2) (right of national treatment in access to government sales, contracts, and concessions).

17 But as I noted in section II.C. above, the majority's view creates equal or greater illogic in the Treaty.

18 Under my analysis, we would have no need to reach this question.

19 For instance, C. Itoh-America currently classifies its employees into a "Japanese staff" and an "American staff." Over 90% of management-level positions are filled exclusively by the Japanese staff. The Japanese staff also receives higher salaries, benefits, and bonuses than

company would not be able to so discriminate under my interpretation of articles XXII(3) and VIII(1). This is really the only point at which the majority's "crazyquilt pattern" emerges in practice.

Thirdly, if article VIII(1) and perhaps a few other articles do confer a superior degree of rights upon companies of Japan and not upon their American subsidiaries, I do not view this as an "illogical . . . distinction." It is very reasonable that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party. If a company of Japan wishes to safeguard a few superior legal rights under the Treaty, it may choose to do business in the form of a branch office. But if the Japanese company seeks to gain the additional tax and legal benefits that our laws confer on American-incorporated companies, they will create a separate legal entity under the aegis of American law. The line between Japanese incorporation and American incorporation is a bright and distinct one. If Japanese investors choose to cross that line in order to gain *all* the benefits of our legal system on a basis equal with American corporations, I find it eminently reasonable that they accept legal responsibilities and duties on an equal basis as well.

---

counterparts on the American staff. All federal, state, and local taxes on these greater benefits are paid by the company.

Some of these practices may be justified by the need of Japanese investors "to control and manage enterprises which they have established or acquired." Article VII(1). That right is guaranteed by the Treaty in absolute terms, and United States law may not infringe upon that right unless there is a clear Congressional intent otherwise. If some of C. Itoh-America's discriminatory practices are protected by article VII(1), I suspect that they could also claim protection from the BFOQ exception to Title VII. But these are questions that should be determined at trial.

III. Secondary Sources of Interpretation

My analysis up to this point has been based entirely on the language and structure of the Treaty itself. In contrast, the majority relies entirely on four secondary sources. It is certainly proper to use such sources, *Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-38 (5th Cir. 1967), but they should not be read selectively. For instance, the majority does not discuss a dispatch that Secretary of State Dean Acheson sent at the height of the Treaty negotiations to the American Embassy in Japan (hereinafter cited as the Acheson dispatch) with the heading "FCN Treaty. Interpretation of Certain Provisions." The Acheson dispatch was a response to a previous telegram from the embassy asking a set of questions that are not available to us now. From the tone of the Acheson dispatch, the contents were apparently intended to be delivered to the American negotiators and interpreted to the Japanese representatives. The first paragraph of the dispatch seems to be an attempt to clarify the purpose of article XXI(1)(e), an exception to the general test of corporate nationality, which I discuss in part II.B. above. That paragraph reads as follows:

> The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, *is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded.* (Emphasis added).

I cannot imagine a more authoritative or explicit rejection of the majority's view that the nationality of a company under the Treaty is to be determined by the nationality of its controlling shareholders.

Secretary Acheson's view was strongly confirmed twenty-four years later by a State Department dispatch from Secretary of State Henry Kissinger. In the summer of 1975, the American Embassy in Tokyo was involved in discussions with the Government of Japan regarding the Treaty status of an American-

owned Japanese company—the mirror image of the question we face. The Japanese government had taken the position that such a company had Japanese nationality and was thus excluded from Treaty benefits inside Japan. The American embassy had argued in response that the nationality of a majority of the shareholders determined the nationality of a corporation—exactly the position taken by the majority opinion here. Telegram from the American Embassy in Tokyo to the Department of State, Tokyo 11177, dated August 15, 1975. Secretary Kissinger and the State Department explicitly rejected the embassy's view in the reply dispatch of January 1976. The airgram first contains the general language quoted by the majority to the effect that article XXII(3) is only "meant to accomplish . . . the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a 'company' for purposes of the treaty." The Secretary then continues with more specific language omitted by the majority opinion:

> For reasons stated above, argument in para 2 of reftel [the embassy's original telegram of inquiry] that nationality of a company is determined by nationality of shareholders is not correct. *Rather, a company has nationality of place where it is established* (see pp. 382-83 of Walker) [referring to the Herman Walker article cited in the majority opinion as *Provisions on Companies*]. However, this does not mean that GOJ [Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the *company's status and nationality are determined by place of establishment,* this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, *an American company (i.e., one organized under U.S. law),* may manage its Japanese subsidiary (i.e., a company set up under Japanese law). . . . In sum, the substantive rights of U.S. na-

> tionals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, *the status and nationality of the investment are determined by the place of its establishment.* (Emphasis added).

Airgram from Secretary of State Kissinger to American embassy in Tokyo, No. A 105, dated Jan. 9, 1976 (hereafter cited as the Kissinger dispatch).

Secretary Kissinger was arguing against two extreme views, the Japanese government's view that the American-owned company incorporated in Japan had *no* rights under the Treaty, and the embassy view that an American-controlled Japanese company was still a company of the United States. Speaking to the Japanese government's view, Secretary Kissinger states that the definition of "company" in article XXII(3) does not deny rights under the Treaty. Of course it is quite accurate to say that a definition does not create or deny substantive rights, but it inherently limits the *scope* of rights conferred in other, substantive sections of the Treaty. Rejecting the extreme positions taken by the Government of Japan and the American embassy, Secretary Kissinger chose the middle view that conforms with the plain meaning of article XXII(3): an American-owned company incorporated in Japan is a "company of Japan" but still has the specific rights expressly granted to controlled enterprises by other sections of the Treaty, most notably the article VII(1) grant of national subsidiary treatment. I would apply that same analysis to C. Itoh-America.

The four secondary sources relied upon by the majority opinion are pale authority compared to such explicit statements by Secretaries of State Acheson and Kissinger. A careful reading of the first of these authorities, the Bassin Memorandum, shows that the writer was discussing article XXII in the context of a specific question from one of the Japanese negotiators about what "juridical status" meant as used in the article. Mr. Bassin answered only that limited question, and the

subject of corporate nationality never came up because it is discussed in a separate and independent phrase of the article. Recognition of a juridical entity and ascription of its nationality are separate questions, and the Bassin Memorandum, quite simply, never addresses the latter.

The second authority cited by the majority opinion is a pair of statements by FCN authority Herman Walker. I read the first of these passages as direct and unambiguous support for the place-of-incorporation test:

> "Every association meeting this simple test of valid existence [acknowledgment by the state under whose laws the corporation was created] must be accounted by the other party *a company of the party of its creation,* and have its juridical status recognized without any reservation for the laws of the forum" (emphasis added).

Provisions on Companies at 380-81. The Kissinger dispatch cites the same article by Dr. Walker as authority for this view, and the article as a whole clearly supports the place-of-incorporation test. *Id.* at 380-82. The second Walker quotation is, like the majority's quotation from the Kissinger dispatch, directed at a question that is different from the one we face. Dr. Walker states that "[t]he recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits." *Id.* at 383. No party to this suit has argued that the definition of corporate status and nationality in article XXII(3) creates substantive rights, but, as discussed above, a statutory definition inherently limits the *distribution* and *scope* of rights created elsewhere. The majority's quotations from Dr. Walker are entirely consistent with my interpretation of article XXII(3).

The final authorities relied upon by the majority are the 1976 cable from Secretary Kissinger and the October 1978 letter from Lee R. Marks to Abner W. Sibal. I have discussed portions of the Kissinger cable omitted by the majority, and find that the entire cable offers overwhelming support to the view that the nationality of a corporation is to be determined

by the place of incorporation. The Marks-Sibal letter is only one of a pair of letters from State Department deputy legal advisors, written about one year apart, that take directly opposite views on the question before us. The letter that supports my view of articles XXII(3) and VIII(1) is dated September 11, 1979, and is from State Department Deputy Legal Advisor James R. Atwood to Lutz Alexander Prager, Assistant General Counsel of the EEOC. The majority quotes the Atwood-Prager letter in their footnote 3, but dismisses the letter as an "aberration" in State Department policy. After a full reading of the Bassin Memorandum and the Acheson and Kissinger dispatches, it seems apparent that the Marks-Sibal letter is, in fact, the aberration. But I find both letters to be entirely conclusory and largely insignificant in light of the clear position taken in the Acheson and Kissinger dispatches.

To summarize, the majority rejects the plain meaning of article XXII(3) even though their reading creates major problems in the internal structure and consistency of the Treaty. Their authorities for this reading are four secondary sources, two of which (the Kissinger dispatch and Herman Walker articles) clearly support the plain meaning of article XXII(3), one of which (the Bassin Memorandum) is inconclusive, and one of which (the Marks-Sibal letter) is offset by an equal or superior interpretation to the contrary (the Atwood-Prager letter). The majority ignores the Acheson dispatch, the most authoritative secondary source available to us. In contrast, if we simply follow the clear test set out in article XXII(3) and hold that a company incorporated under United States law is a "company of the United States," the Treaty is a precise and cohesive document. This reading of article XXII(3) is supported by consistent, explicit, and authoritative interpretations by the State Department dating back to the height of the Treaty negotiations in 1952. I would hold that C. Itoh-America is not a company of Japan but a company of the United States and is, therefore, not within the terms of article VIII(1).